United States Court of Appeals

for the Second Circuit

APPENDIX

77-7217

In The

United States Court of Appeals

For The Second Circuit

MAGNALEASING, INC.,
Plaintiff-Appellee,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,
Defendants-Appellants.

ORIGINAL

JOINT APPENDIX

Volume II, pp. 1 - 423

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 ----------x

4 MAGNALEASING, INC., :

5 Plaintiff, :

6 vs. : 74 Civ. 5593

7 STATEN ISLAND MALL, :
BLACKFRIARS REALTY CORP.,
8 TOTTENHAM REALTY CORP., :

9 Defendants. :

10 ----------x

11 Before:

12 HON. LLOYD F. MacMAHON,

13 District Judge.

14

New York, March 22, 1976,
15 10:00 a.m.

16

17 APPEARANCES:

18

KEANE and BUTLER, ESQS.,
19 Attorneys for plaintiff;
Thomas Butler, Esq., and
20 Sheila Kahoe, Esq., of Counsel

21

MARSHALL BRATTER GREENE ALLISON & TUCKER, ESQS.,
22 Attorneys for defendants;
James Bergen, Esq., and
23 Jeffrey Newman, Esq., of Counsel

24

25

THE CLERK: Magnaleasing, Inc. vs. Staten Island Mall, Blackfriars Realty Corp. and Tottenham Realty Corp.

Is the plaintiff ready?

MR. BUTLER: Ready.

THE CLERK: Are the defendants ready?

MR. BERGER: Ready.

THE COURT: Proceed.

MR. BUTLER: Would your Honor like an opening statement?

THE COURT: Very briefly, yes, I would.

MR. BUTLER: Your Honor, we represent the plaintiff Magnaleasing, which intended to lease out of the Staten Island Mall, which is an enclosed shopping center between two buildings, Macy's on one end and Sears on the other, and there is a passageway between the two stores and in that -- that's what's called a a mall -- there are two levels and there are some stores. There people buy food and televisions and clothes and every other thing.

It is our contention that Staten Island Mall, in leasing that center, engaged in a deliberate fraud which was commenced some time in August of 1972. At that time the mall was scheduled to open

in March of '73 and was only partially leased. It was under construction. They came out with the circular, an advertising brochure, representing that the store was over 50 per cent leased and lots of stores were coming in, national chains. The fact of the matter is that only 19 per cent of the store was leased. That set the tone. The object was to get this place leased at any cost.

In December, when we went there, we had these circulars, these statements about the occupancy, and we talked to a fellow by the name of Kirtland who worked for Feist & Feist.

Now, Feist & Feist was the developer and the managing agent for Blackfriars and Tottenman, which are two separate corporations which formed a joint venture which organized the mall and owned the mall. Feist & Feist and the individuals of Feist & Feist are also officers and owners of each of those corporations. So the knowledge of one is the knowledge of the other. They were all the same people. The vice president of Feist & Feist was the vice president of Tottenham and was the vice president of Blackfriars. So the knowledge of one was the knowledge of all.

Now, at that meeting Mr. Kirtland repre-

sented to our client that -- let's say there are three basic items of a rent. I will reduce it to its simplest form: the base rent which you pay, the square foot charge, and your two other costs, the two major costs, are your tax rent, what are going to be your taxes, and what are going to be your common area.

Now, the tenants share the taxes and the tenants share the common area expenses. At that meeting Mr. Kirtland said that in their opinion common area charges would be 60 cents. That was their estimate. That estimate was put in the lease. In the lease it states the landlord represents, the landlord states, that your estimated common area charge is 60 cents a square foot for the beginning period of the mall, approximately a year, and the taxes were going to be $1.25, 25 to be paid by the landlord and $1 to be paid by the tenant.

In their possession at that very time, and this is important because this is not an estimates case --

THE COURT: What was the period of this lease?

MR. BUTLER: The lease was to run for 15

years.

THE COURT: And the landlord, you say, represented the taxes were going to be $1.25?

MR. BUTLER: Starting for the first year, and then you have your normal increases. Whatever the tax rate is, it is, but their assessment, their estimate which they had provided to the tenant for the mall as a completed mall, what would the first year's taxes be? They said approximately $1. That's our estimate of what the taxes would be.

After that, you know, if the rate was $1, $1.15, $1.20, fine. The second or third year, whatever New York City does, you pay your taxes like anybody else. Those are costs which go up.

Common area, 60 cents. "We estimate, they said, "that for the first year of operation, from everything we have, it will be 60 cents a square foot." It might be 65. The following year it might be 70 cents, it might be 80 cents. Inflation and everything else. But for the first year, these are ball-park figures which we can live with.

The important thing here is that in their possession -- these are estimates which they make. In their possession they had in their hand an estimate from

their own source, from their own financial information, which said to them taxes aren't going to be a dollar a square foot, taxes are going to be 2.53 or 2.35 a square foot.

(Continued on next page.)

2 This is what they had. On common area charges
3 they had in their hands an estimate of common area charges
4 of $2.30 a square foot, so what they were doing is they
5 weren't giving us an stimate which they themselves had,
6 and that, your Honor, is where we say the fraud is. If they
7 had said to us "Our estimate is $2.35", well, No. 1, we
8 would never have gone in there, but if we did go in there
9 at $2.35 and the next year it was $2.30 or 2.40 it would be
10 a different ball game. But the fraud here isn't whether
11 they had a basis for the 60 cents, because that is a
12 case of negligence, which is our third or fourth cause of
13 action, but the core of this case is that they had in
14 their possession, and they knew that the common area
15 charges were going to be around $2.40, and do you know
16 what they came out to? $2.50.
17 And they knew that the taxes were going to be
18 $2.50 or more. They didn't tell anybody, but they did
19 tell the sales people to tell them it was going to be one
20 dollar, and they did tell the sales people to tell them it
21 was going to be 60 cents, but they did not tell them any-
22 thing else. And they knew that the tenants were going
23 to ask about the common area charges and taxes, and there-
24 fore they provided $1.60 -- the dollar figure and the 60-
25 cent figure.

They knew that the tenants were going to rely on those figures. They knew that the tenants could not obtain the common area charges because this was a new mall. There was no way that the tenant could get the cost. They knew that the tenant couldn't determine what the tax figure was going to be, because, again, this is a new mall -- '72 -- the property was just assesssed as vacant land. A mall was going up.

They knew that, and they had the information, and they were holding it back because they were having problems renting that mall. They weren't telling anybody. So at that meeting, on December 4th, we have those beautiful brochures about the place being leased, over 50 per cent, and the salesman says "Listen, you have to get in here overnight. We are almost 90 per cent full" -- that is another misrepresentation -- occupancy, almost full; $1.60; fine!

Now that representation about occupancy is extremely important, because it goes on two things:

(1) We never would have gone into a mall, entered into a lease in December on a new mall which was less than 50 per cent full. At that time it was scheduled to open in March, two months later. We say that is a deadline.

So they had to create the feeling that this was going to be very, very successful.

The second thing -- they later changed the date to August -- the second thing which they did on the occupancy, the second point about that is we were paying our proportionate share of common area. So let us say we were paying $1 a square foot for taxes -- right? And there were 420,000 square feet in the mall.

Now if we know that the mall is going to be only half full, then we know we are not going to be paying a dollar; we are going to be paying $2, because whatever the tax is, if it is only 50 per cent that is in there, we are going to be paying the whole tax. The tax doesn't depend on how many people are there; the taxes are fixed. the tax is $420,000 regardless of how many people are in the mall. So we wouldn't know what they had, and they knew that, and that is why they had to keep the occupancy levels up in talking to us.

So this isn't an estimate case; this is a fraud case. It is common law fraud. If it was a securities case we would be walking home; we wouldn't even be here. But this is a common law fraud, and I believe that we can establish the representation, which was a material fact that we relied on, that we were justified

in our reliance, that it was false, and that they knew it was false, and that we have been injured.

THE COURT: Do I gather correctly that the only claims of fraud that you make are those you stated in your opening statement?

MR. BUTLER: There is one other, your Honor. It is a third department store.

THE COURT: There are a number of others in your amended claim. Are there any there that you have abandoned? That is all I am trying to find out.

MR. BUTLER: We have abandoned the second cause of action which has to do with the operating agreement.

THE COURT: The second cause of action is abandoned.

What about the number of representations you make, starting with A and running through G?

MR. BUTLER: Your Honor, if we may start with B -- let me double check on A.

I think that might be covered In a more general sense --

THE COURT: I just want to know which ones you abandoned.

MR. BUTLER: B is in; C is in; D is in; E is in; F --

ks5

THE COURT: Which ones are out? That is what I want to know.

MR. BUTLER: F is out. Okay, that's about it.

THE COURT: F is the only one that is out?

MR. BUTLER: F is out, and I would take out just that last half of A, "That defendants were turning away tenants".

MR. BERGEN: I did not hear that.

(Record read by the reporter.)

2 MR. BUTLER: Paragraph 11 is out; 12 is out; 13 is out.

THE COURT: Thank you.

MR. BUTLER: And the second cause of action is out.

THE COURT: Thank you very much.

MR. BUTLER: Thank you, your Honor.

THE COURT: Mr. Bergen.

MR.BERGEN: Your Honor, despite what Mr. Butler says, this is an estimate case. Very simply stated, it is an estimate case. This was an arm's length transaction between Magnavox -- that is who the negotiations were orignally held with, because Mr. Kelly, who held these negotiations, was an employee of Magnavox, and in December of 1972 Magnaleasing wasn't even in existence. It did

not come into existence until February, after all the alleged misrepresentations were made, so we really do not have the proper party here, to start off with.

Secondly, Magnavox, and what turned out later to be Magnaleasing which signed the lease, which was really a shell and a wholly-owned subsidiary, is one of the largest corporations in the United States. We are not dealing with a mom-and-pop operation out on a Staten Mall. These weren't neophytes in the business world. They knew exactly what they were doing. Mr. Kelly testified on his deposition that he knew it was an arm's length transaction, and he was trying to get the best deal, and this was the Staten Island Mall. They signed a 15-year lease -- I have it right here -- 79 printed pages. There isn't anything left out of this lease, and anything that was left out was omitted because either one party or the other wouldn't agree to it.

With regard to the provision about taxes, there is a detailed, complicated formula in here about taxes; about common area charges, there is a detailed complicated formula in here about common area charges.

So far as the statement about the representation of 60 cents, we do not even concede that Mr. Kirtland made that representation, because he doesn't recall what he said

to Mr. Kelly. The lease states, and I quote:

"For purposes of the period from the Commencement Date to the date Landlord furnishes the first statement to Tenant, Landlord's estimate of Tenant's proportionate share of common area charges shall be 60 cents per annum per square foot of floor space in the Demised Premises."

In other words, "Until we really find out what the common law charges are going to be we are going to bill you at 60 cents. At the end of that initial period, if it is less than 60 cents you will get rebated; if it is more than 60 cents you will have to pay whatever your share is of the difference."

As far as these brochures and the statement about 50 cent rented, and the third department store, Mr. Butler's figures about the 50 per cent area, well, this 50 per cent omits the two large department stores that were in the mall: Macy's and Sears. So when he says it wasn't 50 per cent, he is forgetting the fact that there were two huge stores that were going to be in the mall.

As far as the third department store, it wasn't any misrepresentation. Mr. Kelly was told specifically that there hadn't been any final deal signed on the third department store. Sure, it was in the plans.

There were also plans to have a fourth department store, and there was a plan to have an office building of 15 or 20 stories, but all of those were plans, just like estimation of taxes and estimation of common area charges where nothing more than estimates -- plans for the future.

What really happened here was that Magnavox made a very bad bargain, and they made a bad deal. The economy fell hard in 1973 and 1974, and by the end of 1974 they wanted to get out of it. They wanted to close up the store -- in fact, the store is closed right now because the sub-tenant that they got to operate the store just walked out and abandoned it one day, and I submit that there wasn't any fraud here -- they just did a lousy job of negotiation. They got a bad deal, a bad lease so they want to get out.

THE COURT: We will take a very short recess.

(Recess.)

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THE COURT: I am sorry for the interruption and the delay but it was made necessary by one of those last-minute applciations which the lawyers love so dearly.

MR. BERGEN: Your Honor, before we start, the plaintiff and the defendants have worked out a joint statement of stipulated facts and we also have some disputed facts, like contentions,attached to the end of it.

THE COURT: All right. Why don't we just make it part of the record.

MR. BERGEN: Fine. Do you want me to hand it up?

THE COURT: Yes, hand it up. We will call it Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 was received in evidence.)

xx

THE COURT: Unless that interferes with the numbering system that you already have on your other documents.

MR. BUTLER: That's no problem.

Your Honor, the plaintiff would like to call as its first witness Mr. Dale Kelly. It has been stipulated that there was a meeting on December

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4, 1972 and that Mr. Dale Kelly was at that meeting, so it cuts everything short and we will start there if we may.

D A L E K E L L Y, called as a witness by plaintiff, being first duly sworn, testified as follows:

MR. BERGEN: Before we start, Mr. Butler, can you just state on the record that the fifth cause of action has also been abandoned? That's the one that relates to the second one.

MR. BUTLER: To the operating agreement, yes.

THE COURT: The fifth cause of action has been abandoned, all right.

DIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Kelly, are you employed by Magnavox?

A Yes, I am.

Q Are you employed by Magnaleasing?

A No.

Q As I mentioned to the court, we have put you at a meeting on December 4, 1972 and it has been stipulated that that meeting took place in a trailer at the Staten Island Mall and that you, John Kelly,

Darryl Laxon, George Kirtland were present and the purpose of that was to discuss a possible lease at the Staten Island Mall.

At that meeting were you given anything by Mr. Kirtland?

A Yes, we were.

MR. BUTLER: Your Honor, the sides have agreed to use copies.

THE COURT: All right, if they are legible.

Q I show you a document which purports to be an advertisement circular for the Staten Island Mall. Is that a copy of the document which you received?

A Yes, it is.

MR. BUTLER: May I introduce this as --

THE COURT: I asked you to mark your own exhibits in advance. It saves time. Either lawyers don't read or they won't listen, I don't know what it is. In case after case nobody marks them.

(Plaintiff's Exhibit 2 was received in evidence.)

xx Q Were you given at that same time this circular for the Staten Island Mall?

A Yes.

THE COURT: Would you line what you con-

sider material? I don't intend to wade through all those circulars.

MR. BUTLER: We wanted to get a stipulation on some of these.

THE COURT: Line what you consider material and I will now read it, but I am not going to sit here and pore through a lot of advertising circulars.

MR. BUTLER: We just have two of them, your Honor.

THE COURT: I don't care if you only have one. Underline what you say is material.

Q Now, at that meeting --

THE COURT: Would you do as I ask so I can read them? Otherwise I exclude them from evidence.

MR. BUTLER: Yes.

THE COURT: Don't just come up here and shovel in everything. I want to see what this case is all about.

(Plaintiff's Exhibit 3 was received in evidence.)

xx MR. BUTLER: Exhibits 2 and 3, both sections just referring to the lead paragraphs and cap-

tions there that state that the mall has passed 50 per cent.

Q At that meeting would you be kind enough to tell me what Mr. Kirtland said to you and what you all said to Mr. Kirtland?

A Well, first he wanted to know what we were going to put in the space. We explained that we were going in with what we call a Magnavox Home Entertainment Center, which is a retail outlet that sells Magnavox products, and he wanted to know whether or not we were going to operate it and we said, "No, we have tenants that we bring in and sublease the space to them. We sign the master lease and the tenant takes over the operation of the store itself."

Then we went on to talk agout the space and what it represented. He said that we were very fortunate, that the mall was about 90 per cent completed -- leased, rather --

THE COURT: What did he say, completed or leased?

THE WITNESS: He said leased. I am sorry.

A It was about 90 per cent leased. And he said we were very fortunate, that there were only

one or two spaces left of our requirements. We were talking about a three or four-thousand-square-foot store. And he made it very clear that -- he brought out a map -- I mean a chart of the center itself and on it was indicated the leases that had already been signed and also what was available, and there was one location, as I recall, that was somewhere near the middle of the mall, the one we were first talking about, and he didn't think that was satisfactory to us. We wanted to be next to Sears, as I recall, and he made it clear again that none of that area down there was available.

He came out with another location for us, which was next to Macy's, and then he explained to us what the lease costs were, what he was asking for the space.

MR. BERGEN: I am going to object to any testimony by Mr. Kelly about lease costs, particularly any statements that he is going to say that Mr. Kirtland said about taxes or common area charges, on the grounds of parol evidence. Thsoe two items are covered in detail in the 79-page written lease.

MR. BUTLER: Your Honor, this case is a fraud case and we are talking here about representa-

tions which were made.

THE COURT: Hold it. The objection is overruled.

Q Go ahead.

A We discussed the area and costs. We explained to them what it was, that we had developed this program, as I said, the home entertainment center program, and that it was a subleased tenant, and obviously whatever we were going to do, that we would represent those costs to that tenant, the prospective tenant that would be coming in to operate the center.

We went over in detail --

MR. BERGEN: Can we have who was talking, your Honor, rather than just "we"?

THE WITNESS: Yes.

A Kirtland was the only one there, who represented Feist & Feist in the trailer park -- in the trailer, rather, and myself and Kelly and Darryl Laxson were at the meeting, who were here when this discussion was taken place.

Obviously we were interested in getting into the mall. Feist & Feist were a reputable -- they were fine people as developers of malls and we

felt that it was a good thing. We were obviously trying to get in at the least possible cost that we could.

Q What did Mr. Kirtland say? Did you ask him what the cost would be?

A Oh, definitely, we went over the costs, and at that time, why, he quoted high prices of $10 a square foot, I think was the initial price we talked about, and he talked -- he went over it in detail and I made notes at the meeting, because we in turn had to go out and sell this to somebody else who we would bring into the mall to operate this business, so obviously we had to have exact figures to work with or otherwise we couldn't sell someone else in coming into the mall.

Q I show you this document. Is that a copy of your notes?

A Yes. This is a copy of the notes after I had come back to my office itself after talking to Kirtland, after the phone call with Kirtland, that I gave to Darryl Laxson to develop a pro forma statement for the store that was about to come into the mall.

Q Now, getting to the costs which you say you talked about, the rent: did you talk about any

other costs?

A Yes. All costs. The maintenance costs, the taxes. All costs involved.

Q With regard to the taxes, what did he say?

A He said that the taxes would be $1 a square foot. He estimated that that's what they would be. He said, "You can use that figure of $1 a square foot."

Q Now, he knew you were going to sublease the premises, is that correct?

A Oh, very definitely. Very definitely.

Q And he told you that you could use that figure in talking to the person you were going to talk to?

A That is correct. That's exactly how he represented it.

Q That was an estimate of taxes?

A That was an estimate of taxes. That is correct.

Q Was that estimate for the first year of operation or first six months or when?

A It was the estimate of the first year of operations. That would be our going-in taxes that he talked about.

Q And that would be an estimate of what they

would be?

A That is correct.

Q Now, were there any other costs which he spoke about.

A He talked about the maintenance charges, the area maintenance charge. Here he represented it to us as being 60 cents a foot.

Q That was an estimate?

A That was also an estimate, yes.

Q Did he say you could use that figure?

A Yes. What we were running down at that meeting was what we were going to present to a prospect for us for developing a home entertainment center, that is correct.

THE COURT: Did he tell you that they were the estimates?

THE WITNESS: Yes.

THE COURT: And also the taxes?

THE WITNESS: Also the taxes, yes.

To quote him directly, he said, "You can use that figure in planning your home entertainment center."

As I said, he knew that we were going to sublease it to another party, but he said that

obviously it was an estimate and things could go up and they were in line with other centers that we had leased with. In fact, they were high.

THE COURT: Mr. Butler, I would appreciate your holding the witness to the conversation and omitting all the conclusions.

MR. BUTLER: Yes.

Your Honor, I would like to introduce Exhibit 4, if I may.

Is there any objection?

MR. BERGEN: No objection.

THE COURT: All right.

(Plaintiff's Exhibit 4 was marked for identification.)

xx THE COURT: Some of it is not legible. I will take whatever is elgible and reject the rest of it I have better things to do than puzzle through things I can't read. I will exclude it.

MR. BUTLER: Just the first page, your Honor.

THE COURT: I will exclude it. Submit a legible photostat or the original.

All right.

(Plaintiff's Exhibit 4 was received in

MR. BERGEN: Is that going to be substituted on the outside or is the rest of it not in. There were four or five pages to the exhibit.

MR. BUTLER: No, just this one page.

BY MR. BUTLER:

Q Mr. Kelly, is that document, Plaintiff's 4, a copy of your notes?

A That is correct.

Q And were those notes prepared at or about the time of the meeting?

A Yes. They were prepared right after the meeting.

Q Right after the meeting. The tax figure there which you have, taxes, will you tell me how you arrived at that figure?

A Well, it was 3360 feet which we were talking about, and you will note that the taxes are shown there $360, or $1 a square foot, what he estimated the taxes to be.

Q And the maintenance figures which you have?

A The maintenance figures I have, which we had developed from -- 60 cents a square foot, which I did arithmetically, which is an obvious mistake of

pennies in the multiplication -- dollars, I should say, not pennies.

Q These are the notes which you prepared at a meeting you had?

A Yes. This was some time after; I don't remember when it was, but after we had the final word of what the costs were going to be.

Q And this reflects your best knowledge of what was told to you at that meeting in regard to common area charges and taxes?

A No. Not at that meeting. At a later date when we finalized the program on the telephone.

THE COURT: These are not the notes of the meeting we have been talking about. That's what I understood you to say. They are not?

MR. BERGEN: I object to them then, your Honor.

Q Were these notes prepared after the meeting?

A They were prepared after the meeting, that is correct.

THE COURT: After what meeting?

Q After the December 4th meeting?

THE COURT: When after?

Q These were prepared --

A I am not sure, your Honor, exactly when they were prepared. They are the figures that we used to present to our prospect to go into the mall.

MR. BERGEN: I move to strike it, your Honor.

THE COURT: Sustained. Strike it out, unless you can lay a better foundation.

Q Did you take any notes at the meeting?

A Yes, I took notes at the meeting.

Q Did you convert those notes to this sheet of paper?

A Yes. That's exactly right.

Q Does this, to the best of your knowledge, accurately reflect the notes you took at this meeting?

A Yes.

MR. BERGEN: Objection, your Honor. Mr. Butler is leading him slightly.

THE COURT: Don't worry about it. I bear that in mind in judging credibility just the way a jury does.

Go ahead.

Q At the meeting what did you write your notes on?

A I wrote my notes on a promotional booklet

that Mr. Kirtland had given us.

Q And then what did you do after the meeting with those notes?

A I don't know what happened to those notes.

Q Did you transcribe them at all?

A Yes. I transcribed the notes onto, I assume, this piece of paper.

MR. BERGEN: Objection, your Honor.

THE COURT: Sustained.

Q Now, going back to the meeting where we discussed the 60 cents and a dollar, was there any discussion with regard to a third department store?

A Yes, there was a discussion of a third department store.

Q Can you tell me your best recollection of what that was?

A Yes. He just said that they were negotiating with a third department store, and we asked him what the department store would be and he said at this time he isn't at liberty to tell us, it was just in the negotiating stage.

Q Did you know that at the time you were talking to Mr. Kirtland that the mall was less than 50 per cent occupied?

MR. NEWMAN: Objection.

MR. BERGEN: Objection, your Honor.

MR. NEWMAN: Objectionas to form, your Honor.

Q Did you know what the actual occupancy of the mall was at the time you were negotiating with them?

A Mr. Kirtland showed us a man of the center on which it was clearly marked on the black dots showing where leases had been signed --

MR. BERGEN: I don't think the witness is responding to the question, your Honor.

THE COURT: I think it is responsive. Go on.

A He presented this chart showing black dots on it for which leases had been signed, and on the same chart he had names of various stores that had signed other leases since that time.

THE COURT: You mean that weren't black dots?

THE WITNESS: That weren't in black dots, no.

THE COURT: Do you have that chart?

MR. BUTLER: We have one, your Honor. The one which Mr. Kelly is talking about is coming

down. We thought we had it with us. We had eight of these and we thought we had that one, but we don't have that one.

I would rather wait until we got that one because there is some handwriting on that, too, so I would much prefer to introduce that one. If we can use this for a sample and then substitute --

THE COURT: No.

MR. BUTLER: We will have it here.

BY MR. BUTLER:

Q Now, Mr. Kelly, have you been engaged in participating in the negotiations for other stores in other malls?

A Yes.

Q From your experience, would you tell me what type of occupancy you would like to have when you do?

MR. BERGEN: Objection, your Honor.

THE COURT: Sustained.

Q Is occupancy an important factor for you in going into a mall?

MR. BERGEN: Objection.

THE COURT: Overruled.

Q Is it? You can answer.

A Yes.

Q What level of occupancy?

MR. BERGEN: Objection, your Honor.

Q You say occupancy is an important factor to you. For what purposes?

A To establish a successful home entertainment center and see to it that it can make a profit for that person thatleases it from us and that it can be successful and that the pro forma statement that we develop is an honest one so that the person can make a profit.

MR. NEWMAN: Objection to that last portion. It is not responsive.

THE COURT: He dropped his voice. I couldn't hear.

Could you read it, please.

(Record read.)

MR. NEWMAN: The question was as to occupancy levels, not pro forma statements, your Honor.

MR. BUTLER: The witness said --

THE COURT: I will let it stand. Go on.

Q If you had known that the occupancy was less than 50 per cent, would you have recommended a lease?

MR. BERGEN: Objection, your Honor.

THE COURT: Overruled. It goes to materiality.

MR. BERGEN: He hasn't established that the occupancy was less than 50 per cent.

THE COURT: I think he has testified that that's what he was told.

THE WITNESS: No.

MR. NEWMAN: Your Honor --

THE WITNESS: I testified, your Honor, that they said it was over 90 --

THE COURT: I heard what you said.

Come on, let's go.

Q How did the meeting end?

A The meeting ended that we would get back to him.

Q Do you know what happened after that?

A After that either George Kirtland called me or I called Kirtland, I talked to Kirtland on the telephone.

(Continued on next page.)

2 Q And approximately when was that?

3 A Approximately ten days or so after that

4 meeting.

5 THE COURT: When would that be?

6 Q On or about December 14th or thereabouts?

7 A On or about December 14th or thereabouts.

8 Q And what did Mr. Kirtland say to you and what

9 did you say to Mr. Kirtland?

10 A Mr. Kirtland advised me that we had better get

11 with it if we wanted to get in the mall, that they were

12 closing out the leases fast, and we should come to a con-

13 clusion and accept his offer.

14 I told him it was in the hands of Mr. Kelly who

15 was responsible for negotiating the lease, and I wanted to

16 get in the mall but I did not believe Mr. Kelly would go

17 to that figure that he was asking.

18 Q Did you have a telephone conversation with them

19 after that?

20 A Yes, I believe after that, yes.

21 Q Can you tell me --

22 THE COURT: Who is this Mr. Kelly?

23 MR. BUTLER: Another one -- we have two Kelleys --

24 John Kelly.

25 THE COURT: Thank you. There is nothing like

a mystery!

Q We were talking about the telephone conversation which you had with Mr. Kirtland. Now what did you do after that?

A On the telephone I told Mr. Kirtland that the whole thing -- that John Kelly would not go to the figure that he was asking at that time, in my opinion that he would not go over $6.50 a foot for that least, and that he would have to contact Kelly, that it was in his hands and that he was the one that did the negotiations on the lease.

MR. BERGEN: Your Honor, I am not clear whether this is the December 14th conversation or a later one.

Q Is this the telephone conversation which took place after that? You said you --

A Yes, I am sure it was after that because on the first call he was calling me trying to sell --

THE COURT: Please, Mr. Butler, what are you trying to do? I wrote down "December 14". Then the first thing I know you are sliding into something else.

MR. BUTLER: My apologies, your Honor.

THE COURT: The burden of proof is on you. If it is all confused I do not need to tell you where it is going to end on the case.

Q On December 14th you had a conversation, you

1 just testified to, with Mr. Kirtland; right?

2 A Yes.

3 Q Was it on that conversation or the subsequent

4 one when you mentioned the $6.50 figure?

5 A I am not sure whether it was that 14th or the

6 15th or the 16.

7 Q But you told him that you couldn't go above

8 $6.50.

9 A That is correct.

10 THE COURT: Some time this happened.

11 THE WITNESS: Yes.

12 Q In that telephone conversation with Mr. Kirtland.

13 A Yes.

14 Q Did you receive this letter from Mr. Kelly --

15 John Kelly (handing)?

16 A (After examining) Yes, I did.

17 (Mr. Butler hands to Mr. Bergen.)

18 MR. BUTLER: I offer that, your Honor. I am

19 offering that letter from Mr. John Kelly to Mr. Dale Kelly,

20 dated December 13.

21 THE COURT: Any objection?

22 MR. BERGEN: No objection.

23 THE COURT: This came ahead of the December 14th

24 telephone call?

25

MR. BUTLER: Yes, Your Honor.

(Plaintiff's Exhibit 5 was received in evidence.)

xx BY MR. BUTLER:

Q Did you receive that letter before you spoke to Mr. Kirtland (handing)?

A (After examining) I don't recall.

Q This makes mention of a 5 per cent factor. It states;

"At this rental we would have to have retail sales at $632,740/year to achieve a 5 per cent rent factor."

What is the 5 per cent factor which you used?

A 5 per cent of the gross sales done by the center -- the gross retail sales.

Q For rent?

A For rent.

Q And rent includes --

A Rent includes all the total cost of rent.

Q Common area, taxes?

A Common area, taxes, fixed rent.

Q So the figure in here of $31,637 includes common area charges and taxes.

MR. BERGEN: Your Honor, he is leading the

witness; objection.

THE COURT: Yes.

Q After that conversation with Mr. Kirtland about the $6.50 did you have anything further to do with this?

A No, nothing further to do with that after that conversation.

Q Do you know -- it has been stipulate that a lease was entered into.

A Yes.

Q Did you participate in any discussions with any subsequent possible tenant?

A Yes.

Q And who was that?

A Brick Church Appliance.

Q And did you aprticipate --

MR. BERGEN: I object to this on the ground of relevancy, your Honor. I do not see how it is relevant.

THE COURT: Sustained.

MR. BUTLER: Your Honor, he took the information and conveyed to their sub-tenant. It was an important factor to him.

MR. BERGEN: Brick Church never leased the store. It has nothing to do with this case.

THE COURT: Sustained.

MR. BUTLER: I have no further questions of Mr. Dale Kelly, your Honor.

THE COURT: Cross-examine.

CROSS EXAMINATION

BY MR. BERGEN:

Q Mr. Kelly, this meeting of December 4th, that took place at the mall?

A At the rental -- in the trailer.

Q Was this a construction trailer or on the site?

A On the site trailer.

Q Can you describe to the Court what the construction state of the mall was On December 4, 1972?

A Well, it seemed like 90 per cent completed for work.

Q 90 per cent completed?

A That area which he was showing me -- 80 per cent completed -- I am not sure.

Q Mr. Kelly, isn't it a fact that on December 4, 1972 only the Macy store was open?

A Yes, that is true.

Q And the rest of the mall project was literally a hole in the ground with some structural steel?

A It was a shell -- it was in the shell construc-

tion stage.

Q What do you mean by "a shell construction stage"?

A Steel and the concrete was poured.

Q Were the walls up?

A Not the walls in the specific area we are talking about, but there were walls up.

THE COURT: Exterior walls?

THE WITNESS: Some were up, your Honor.

2 Q But there was only one store operating, and that was Macy's?

A I would say so.

Q Did you know that Sears was going to have a store?

A Yes.

Q Now when Mr. Kirtland said to you that the mall was 90 per cent leased, did you ask him whether that included Sears and Macy's?

A No. He showed us a map which we looked at, which showed all the leases --

Q Mr. Kelly --

THE COURT: Please answer the question. Let your lawyer argue the case. He is hired to do that. Just answer the question.

(Question read by the reporter.)

A I don't recall.

Q Now when Mr. Kirtland gave you this dollar deal estimate and the 60-cent estimate, did you or Mr. John Kelly or Mr. Laxson ask him what that was based on?

A Yes.

Q And what did he say?

A I don't recall the exact conversation.

Q What is your best recollection of what he said?

A I don't know. I don't know exactly, therefore I do not want to testify.

Q So you have no recollection.

Now, Mr. Kelly, you said early in your testimony today that Mr. Kirtland said to you that these figures were obviously an estimate, and that things could go up. Do you recall him saying that?

A He didn't say obviously an estimate. He represented to us that those are the figures that we could use in negotiating a lease for the future sub-tenant.

THE COURT: Didn't you tell me that he said they were an estimate? I specifically asked you that.

THE WITNESS: Yes, your Honor.

THE COURT: Less than twenty minutes ago.

THE WITNESS: Yes, your Honor, he said it was

an estimate but we also asked him if we could use the figures and he said. "Yes, you could."

THE COURT: Well, which is it? Did he say they were an estimate or didn't he?

THE WITNESS: Yes, your Honor, he said they were an estimate.

Q The $6.50 figure that you say you and Mr. Kirtland discussed in this telephone conversation some time in December, that was the fixed minimum tent, isn't that right, the $6.50 figure?

A I assume so.

Q Well, was it or wasn't it?

A I assume that it was, yes.

Q In that conversation did you and Mr. Kirtland talk about any estimates for taxes or common area maintenance charges?

A We had accepted what Mr. Kirtland had given us for taxes and common maintenance, and had written it down and presented that figure that we were using to sublease that space, yes.

MR. BERGEN: Your Honor, I move to strike the witness' answer as not being very responsive. I asked him a very specific question.

THE COURT: Strike it out.

Q I ask you again, in that conversation where you discussed the $6.50 figure with Mr. Kirtland, did you and Mr. Kirtland discuss estimates for taxes and common area maintenance charges?

A I don't recall in that specific conversation.

Q Mr. Kelly, this may be simplifying it a bit, but you are more of a marketing man than a real estate man, isn't that true?

A That is correct.

Q And at the meeting of December 4th you personally weren't there to negotiate the lease, were you?

A No.

MR. BERGEN: I have no further questions, your Honor.

MR. BUTLER: I have no further questions of Mr. Dale Kelly, your Honor.

(Witness excused.)

THE COURT: All right, we will take a very short recess.

(Recess.)

MR. BUTLER: Plaintiff calls as its next witness Mr. John Feist.

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ksll

J O H N F E I S T , called as a witness by the plaintiff, being first duly sworn, testified as follows:

MR. BERGEN: Your Honor, may we have the record reflect that we have produced Mr. Feist today so that the plaintiff could call him on their case?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Feist, are you a vice-president of Blackfriars, a defendant in this case?

A Yes.

Q And are you vice-president of Tottenham, another defendant in this case?

A Yes.

Q Are you vice-president of Feist & Feist?

A Yes.

Q We have stipulated, I believe, that you were in charge of the leasing committee at the Staten Island Mall.

MR. BERGEN: I think the stipulation was that he was in charge of the leasing program.

MR. BUTLER: Program.

Q I believe it has been stipulated also that some

time prior to August, 1972 you arrived at what you characterized as a guesstimate of common area charges of 60 cent; is that correct?

A That is correct.

Q And at the same time the common area charges -- I mean the taxes of $1.25 -- 25 to be paid by the landlord and one dollar to be paid by the tenant.

A That is correct.

Q I show you Plaintiff's Exhibit No. 2 (handing).

(The witness examines.)

Q Is that an advertising circular put out by thw Staten Island Mall?

A That is correct.

Q Was that advertising circular put out in connection with obtaining tenants for the mall?

A No.

Q Well, was this advertising circular to be used by your sales persons?

A It could have been.

Q And was it provided to them?

A Yes.

Q And did you expect that they would useit?

A I left that up to their own judgment.

Q This is dated August 1972, and referring to an

article on the front page it says, "Mall breaks 50 per cent mark."

The first paragraph says, "More than 50 per cent of the space in the Staten Island Mall has been leased by local and national chains."

Do you see that?

A Yes, I do.

(Continued on next page.)

2 Q Does that article refer to Macy's or Sears?

3 MR. BERGEN: Your Honor, the article speaks

4 for itself.

5 THE COURT: Sustained.

6 Q Now, the mall, what part of that -- let

7 me show you the project on the front page. What part

8 of that front page is considered as the mall of

9 Tottenham and Blackfriars?

10 MR. BERGEN: Your Honor, I don't under-

11 stand the question. What does he mean to project

12 on the front page?

13 MR. BUTLER: We have a photocopy -- a

14 photo of the mall, so we are using the same terms.

15 THE COURT: Just state your question. I

16 don't understand it.

17 Q On one end of the mall is what?

18 A Macy's.

19 Q And on the other end of the mall --

20 MR. BERGEN: Objection, your Honor.

21 What has this got to do with it?

22 THE COURT: Let me see the picture.

23 Would you fix the time that you are

24 talking about, Mr. Butler?

25 Q In August of 1972was Macy's on one end of

the mall?

A Yes.

Q That's what's characterized as an anchor store?

A That's correct.

Q Macy's is wholly owned by Macy's, is that correct?

MR. BERGEN: Your Honor, I object. Does he mean the store?

Q The Macy's, does that store --

THE COURT: What difference does it make who owns Macy's?

MR. BUTLER: Your Honor, they are trying to say that 50 per cent included Macy's. Macy's is an independent store owned by Macy's. It is not owned by the mall. The mall has nothing to do with Macy's. Macy's pays its own taxes, it owns the property, it owns the underneath land. It has nothing to do with the mall. When we are talking about the mall, we are talking about the area between the two anchors.

Q Isn't that correct, Mr. Feist?

MR. BERGEN: Objection, your Honor. That may be what Mr. Butler thinks it means.

THE COURT: What is the mall?

Q Is the mall the area between the two anchor stores?

THE COURT: I prefer the qwuestion what is the mall.

THE WITNESS: What is the mall? The mall is the area between the two anchor stores.

MR. BUTLER: That's correct.

THE COURT: That's Macy's and Sears, Roebuck, is that right?

THE WITNESS: That's correct.

Q In or about August of 1972 were you having meetings with your leasing personnel?

A Yes.

Q At the conclusion of that meeting --

MR. BERGEN: Are you finished with this, Mr. Butler?

MR. BUTLER: Not really, but if you want to put it here for the time being, all right.

Q At the conclusion of that meeting would you prepare a report on the amount of space which had been licensed as of August, '72?

A It would be prepared some time after the meeting, yes.

Q I show you a photocopy --

THE COURT: What was the time of this meeting?

MR. BUTLER: Let's get into the meetings then a little bit more.

THE COURT: I just want the time so I can track it. I didn't hear what the time was, or I didn't hear your question.

Q Did you have a meeting, a leasing committee meeting, some time in August of 1972?

A I don't remember.

Q Did you have regular meetings ofthe leasing committee?

A Yes.

Q Is it not so that the meetings were held almost every three weeks?

A Approximately, yes.

Q So is it not so that you probably had a meeting in August?

MR. BERGEN: Your Honor, he said he didn't recall whether there was a meeting.

Q Mr. Feist?

A Could you repeat the question, please?

THE COURT: Did you have a meeting in

August of the leasing committee?

A I don't remember.

Q Did you have one in September?

A I don't remember.

Q Do you believe that you did have a meeting?

A Yes.

Q Now, you have leasing committee minutes, is that correct?

A That's correct.

Q Would the minutes reflect whether or not you had a meeting in August?

A Yes.

Q But it was your practice to have meetings every three weeks, is that correct?

THE COURT: He said so.

Q I show you a document which comes from the tiles of Feist & Feist and ask you if that is a report which would be prepared after such a meeting.

A Yes.

THE COURT: How does the second page relate to the first page, Mr. Feist?

THE WITNESS: It gives the breakdowns of the first level, the second level and the total area.

THE COURT: I see. It doesn't alter the percentage shown on the first page?

THE WITNESS: Not necessarily, no.

(Plaintiff's Exhibit 6 was received in evidence.)

xx MR. BERGEN: Could we have just the date of that?

MR. BUTLER: I am going to go into that right now.

THE COURT: 9/14/72.

MR. BERGEN: Thank you, your Honor.

Q Mr. Feist, that exhibit is dated, I believe, 9/14/72.

A That's correct.

Q Was it prepared on or about that date?

A That's correct.

Q And it was prepared after a leasing committee meeting, is that correct?

A That's correct.

Q It was prepared at your instruction?

A Normally, yes.

Q Did you receive a copy of that?

A Yes.

Q Did you read that?

A I don't remember when I read it at this time.

Q Will you tell me how many square feet of space were leased at the mall as of that date.

A Leases signed?

Q Percentage of leases signed.

A 19. --

MR. NEWMAN: I think the document sp e aks for itself, your Honor.

THE COURT: It speaks for itself, but I don't get the import of your question. Are you asking him to read the exhibit or are you questioning the accuracy of the exhibit?

Q And this document, this exhibit preparedy by Feist & Feist, was this to the best of your knowledge accurate at the time it was prepared?

A It might have been accurate that day. It changed from day to day.

Q But as of the time it was prepared?

A Yes.

Q Now, the percentage of space leased at the mall as of September as reflected on this document is 19 per cent, is that correct?

MR. BERGER: Objection, your Honor.

The document speaks for itself.

THE COURT: Sustained.

Let me see it.

(Pause.)

THE COURT: In the first column on this document one is a percentage of the area and the other is a percentage ofthe total rents that the mall had leased at that point?

THE WITNESS: Is that the second page, your Honor?

THE COURT: No. I am talking about two columns on the first page.

THE WITNESS: The first page is the percentage of leases that ~~were signed,~~ the percentage of leases that were out for signature, and the percentage of vacant space.

THE COURT: What does the 10 per cent refer to in column 1?

THE WITNESS: I would have to look.

THE COURT: Ten per cent of the area?

MR. BERGEN: Can we just show it to him, your Honor?

THE COURT: Yes.

THE WITNESS: We didn't use those figures,

your Honor. This is a standard form that we use.

THE COURT: What does the 10 per cent in column 1 refer to?

THE WITNESS: It has no meaning.

THE COURT: It says 10 per cent of the area. Doesn't it mean what it says?

THE WITNESS: No. The only figure that means anything to me is the total leases signed, and it says "Rent" and that says 1901. We didn't use that column. This was a standard form that we used for our own in-house benefit.

Q Just so we are clear, then --

THE COURT: Clear? The word should be "confused."

Q Let's see if we can straighten it out then.

In September of '72 you were estimating rentable square feet at the mall of $420,000, is that correct? I mean 420,000 square feet, correct?

A That's correct.

Q Now, that was the amount of space which was available for tenants to lease, 420,000 square feet?

A That's correct.

Q Now, the 19 per cent which is reflected

on Plaintiff's Exhibit 6, that represents the amount of space which was actually leased as of that date, is that correct?

MR. BERGEN: Objection, your Honor. The document speaks for itself. It says leases.

THE COURT: Overruled. The witness tells me he didn't make the figures, that he doesn't know what they mean, that they don't use it. Somebody has got to find out what this document means, if it doesn't mean what it says. The front column says 10 per cent of area. What area? The next column says 19 per cent of rent. What rent?

I don't know what they are talking about. Somebody has to explain the exhibit. Go ahead.

MR. BUTLER: Could you read the question back, please.

(Record read.)

A That's correct.

THE COURT: You mean percentage of the area or percentage of the total potential rent? I don't understand what that means.

Q Is that the percentage of the 420,000 square feet?

A That's correct.

Q How, if we go to page 2, taking the very first column, "Leases signed," do you see that?

A Yes.

Q That means that 63,531 square feet of space in the lower mall, that's the first floor, is that right --

A That's correct.

Q -- were unsigned leases, is that correct?

A That's correct.

Q The second figure there, 14,318 is the second floor of the mall, right?

A That's correct.

Q And that means that 14,318 square feet were under lease as of 9/14/72, is that correct?

MR. BERGEN: 14,000?

MR. BUTLER: 14,318.

Q Is that correct?

A That's correct.

Q So the total number of square feet which was closed as 79,849?

A That's correct.

Q And the total number of square feet which you could lease was 420,000 square feet, right?

A That's correct.

THE COURT: And that works out to 19 per cent?

THE WITNESS: That's correct.

Q I would like to show you this November circular, Plaintiff's Exhibit 3.

THE COURT: What's the date of Exhibit 3?

MR. BUTLER: That, your Honor, was November, 1972.

Q Was that a circular put out by the Staten Island Mall?

A That's correct.

Q Do you recall seeing that circular?

A Yes, I do.

Q Was that provided to the sales persons?

A Yes.

Q Did you read this?

A I don't remember.

Q Did you state to the person or persons who prepared this that the mall has surpassed the 50 per cent mark?

A No.

Q I call your attention to the statement which is made there.

A Yes.

Q Do you know who at Feist & Feist made that statement?

A No, I do not.

THE COURT: Who prepared the exhibit?

THE WITNESS: Our promotion department.

Q Do you provide the information to the promotion department?

A Not necessarily.

Q When you say not necessarily, who would do that? Would you do it sometimes?

A Sometimes I might, yes.

Q And were you in charge of merchandising the mall in terms of leasing it and having relationships with your advertising group?

A I don't understand your question.

Q Well, who prepared the Staten Island Mall brochure?

A We had several people do it.

Q Did you have an outside company do it?

A We had an outside company and we had an in-house man.

Q Did you communicate with these persons?

A If I was asked to, yes.

Q Were you responsible for having the mall leased?

A Yes.

Q You were responsible for the sales program, is that correct?

A Yes.

Q And you spoke to these people, isn't that correct?

A That's correct.

THE COURT: Did you see this sales circular, Exhibits 2 and 3?

THE WITNESS: Did I see it?

THE COURT: Yes.

THE WITNESS: Yes, I did.

THE COURT: At or about the time they were published?

THE WITNESS: I don't remember.

THE COURT: Do you see any of this before it is printed?

THE WITNESS: We talk about the stores that are going into it usually. I don't necessarily see it before it is printed, no. Our public relations people do all of that.

THE COURT: But you see it before it

goes out?

THE WITNESS: Not necessarily, no.

Q But you talked about the contents before it goes out?

A Yes. Sometimes. There were six or seven people who talked about it.

Q Do you know what the occupancy of the mall was as far as signed leases as of November, 1972?

A No, I did not.

MR. BUTLER: Your Honor, we have subpoenaed these reports which were monthly reports and we haven't been given these documents.

MR. NEWMAN: Your Honor, these were served on late Saturday night on a receptionist in our office. We have no time or access to get documents. It's a bit late.

THE COURT: Produce them. I suggest you send one of the people up to get them now. They should be here, Saturday night or no Saturday night. They should have been produced during the discovery period.

MR. NEWMAN: Your Honor, they weren't asked for.

MR. BUTLER: They were asked for a number

of times. We were constantly after those figures.

THE COURT: Which one do you want? Do you just want to know what the figure was at 11/2?

MR. BUTLER: One of the issues in dispute here is the entire occupancy right up until the time the mall opened. We say they didn't hit the 50 per cent level until some time in May. So we have requested them up to that point.

THE COURT: I suggest you get all those leases here. Surely there must be some figures on the occupancy month to month on this mall. I can't imagine with this size investment there not being such a thing.

Q On or about November 30, 1972 did you know how many square feet were actually leased in the mall?

A I don't know, no.

Q Did you know that it was under 50 per cent?

A I don't remember.

Q Mr. Feist, isn't it a fact that you didn't lease 50 per cent of the mall up until May or so?

THE COURT: May of when?

MR. BUTLER: 1973.

A I don't remember.

MR. BUTLER: I would like to go into that issue when we get the documents. We have done it ourselves. We have added up the leases. I think it will take a long time to have him go through them and add up the leases, but we will go into that.

THE COURT: Have you already seen the leases?

MR. BUTLER: We totaled all the numbers.

THE COURT: Isn't that all we are concerned with?

MR. BUTLER: Your Honor, I don't know if they will concede to our work product.

THE COURT: I suppose they would if you laid a foundation, that somebody took it from something and compiled a list. There is no point in sending them out for papers that we don't need.

MR. BUTLER: If they will accept our figures I will have Mrs. Kahle take the stand and maybe we can use these then. May I do that, your Honor?

MR. BERGEN: Your Honor, we are back to this definition of whether we include Sears and Macy's.

MR. BUTLER: The witness has just testified --

THE COURT: I heard his testimony.

MR. BUTLER: I'm sorry, your Honor.

THE COURT: That's one of your contentions. It has nothing to do with the proof. Show it to him. Maybe he will concede the accuracy of the figures, I don't know. It helps to talk before you come to court. No wonder you never want jury trials. A jury couldn't stand you.

Q We have prepared a summary of information --

THE COURT: Show it to counsel. He obviously doesn't carry the figures around in his head.

(Continued on next page.)

2 MR. BERGEN: Your Honor, I have never seen
3 this before.
4 THE COURT: Offer it; I will take it subject
5 to a motion to strike.
6 You should have seen it before-- somebody should
7 have.
8 Received subject to a motion to strike.
9 Let me see it.
10 (Handed to the Court.)
11 THE COURT: Is this Exhibit 7?
12 MS. KAHLE: That is correct.
13 (Plaintiff's Exhibit 7 was received in
xx 14 evidence.)
15 MR. BERGEN: May we ask who prepared that, Mr.
16 Butler?
17 MR. BUTLER: Ms. Kahle.
18 BY MR. BUTLER:
19 Q Now, Mr. Feist, the 420,000 square feet which
20 we are talking about is 420,000 square feet of rentable
21 space at the Staten Island Mall -- right?
22 A That is correct.
23 Q That does not include Macy's -- right?
24 A That is correct.
25 Q It doesn't include Sears?

A That is correct.

Q So when you say 40 per cent of the mall is rented you are talking about 40 per cent of the 420; is that correct?

A Yes.

MR. BERGEN: Objection.

Where does it say 40 per cent, Mr. Butler?

Q When you talk about 50 per cent, you are talking about 50 per cent of the 420, is that correct?

A That is correct.

Q When you say thawt over 50 per cent of the mall is rented you are talking about 50 per cent of the 427 square feet, isn't that correct?

A That is correct.

Q Now in November were you informed or did you have information in your possession which would show that the space leased at the mall was approximately 31.9 per cent at the end of November?

A I don't remember.

Q You did have these monthly reports which came after each meeting, isn't that right -- a meeting every three weeks or so, and you would have a report like Plaintiff's Exhibit 6 after each meeting, isn't tghat correct -- or you had in your possession information as to

what was actually rented, didn't you?

A That is correct.

Q When you read Plaintiff's Exhibit No. 2, the August memo, and you saw the 50 per cent figure, did you know that that was incorrect?

MR. BERGEN: Objection as to form.

THE COURT: Overruled.

A Did I know it was incorrect?

Q Yes.

A No, I did not know that.

Q You did not know it was incorrect. Did you take any action to verify that figure?

A No, I did not.

Q In November did you know that the figure, which states:

"Feist & Feist, developers of the mall with associated investors, said that leasing surpassed the 50 per cent mark" -- you read that, is that correct?

A Yes.

Q Did you know that that was not true?

A No.

Q You did not?

A I did not know it was not true.

Q Did you make any investigation as to where you got your 50 per cent figure from?

A Where I got the 50 per cent figure from?

Q Where Feist & Feist got the 50 per cent figure from.

A No, I did not.

Q Did you inform anyone in your advertising department that the figure of 50 per cent was not correct?

A Not that I can remember.

Q Didn't you know in November -- or strike that.

Didn't you know in August that 50 per cent of the mall had not been leased?

A No.

Q You did not know that?

A No.

THE COURT: In short, you did not know whether it was correct or incorrect, is that your testimony?

THE WITNESS: At this time I do not know whether it was correct or incorrect.

THE COURT: At that time did you know whether it was correct or incorrect -- at the time the advertising circular went out?

THE WITNESS: I assumed it was correct.

THE COURT: But you did not know.

THE WITNESS: No, I did not know.

Q You had information in your possession which showed that it was not correct, didn't you?

A No.

Q Plaintiff's Exhibit 6 was prepared --

THE COURT: Argue your case later.

MR. BUTLER: All right, your honor.

Q Now it has been stipulated that from your experience -- you have expertise in leasing malls, is that correct?

A Yes.

Q And you have expertise in operating and maintainint malls, isn't that correct?

A Yes.

Q I am talking about you personally?

A Yes.

Q And Feist & Feist has 70 years of experience, isn't that correct, in leasing malls?

MR. BERGEN: Mr. Butler, can you just refer to your contentions? That was not stipulated to.

MR. BUTLER: I am sorry.

MR. BERGEN: There is nothing about Feist & Feist having 70 years of experience.

MR. BUTLER: This is a non-stipulation.

Q Does Feist & Feist have 70 years of experience in real estate?

A Yes.

Q Mortgages, mortgage financing.

A Yes.

Q Malls, leasing malls.

A Not 70 years in shopping centers.

Q You hold yourself out to the public as being experienced real estate people in shopping centers and malls and development of malls, the operation and maintenance of those, isn't that correct?

A That is correct.

Q And is this a promotional brochure regarding Feist & Feist (handing)?

A (After examining) That is correct.

(Mr. Butler hands.)

THE COURT: I am not going to take all this junk in the case.

What relevance has it?

MR. BUTLER: Your Honor, it is relevant that a person --

THE COURT: He has admitted to. It is cumulative.

MR. BUTLER: Okay.

BY MR. BUTLER:

Q Now one factor which was omitted is that you knew that common area charges, tax charges and occupancy were important considerations to a prospective tenant.

MR. BERGEN: Will you please read the paragraph to him rather than paraphrasing it, Mr. Butler, since we did agree to it?

THE COURT: Aren't you laboring the obvious?

MR. BUTLER: That is correct.

THE COURT: You are laboring the obvious. Obviously the percentage of occupancy is necessarily an important factor.

What good is a McDonald's in an empty mall!

Proceed.

Q With respect to the common area charges did you advise the sales people to give them 60 cents for the common area charges per square foot -- 60 cents a square foot?

MR. BERGEN: May we have that question, please?

(Question read.)

MR. BERGEN: Who is "them"?

MR. BUTLER: I will withdraw it.

Q Did you inform the sales people that your estimate of common area charges was 60 cents a square foot?

A That is correct.

Q And you knew that the sales people would use that information, isn't that correct?

MR. BERGEN: May we have a time plaed on this, Mr. Butler?

Q You gave them that figure at all times, isn't that correct?

MR. BERGEN: At all times when?

MR. BUTLER: From the time the leasing started up until the time the mall opened.

MR. BERGEN: And when was that? Can you just establish the time?

Q Well, when did the leasing program start -- shall we say in January 1972?

A Yes.

Q That is for a starting date, and on the other we will have August 8th -- is it?

A Yes.

Q 1973?

A Yes.

Q So that is the framework we are talking about.

So the 60-cent figure you gave to your sales people -- and you had -- what -- five of them?

A That is corrrect.

Q George Kirtland was one of them.

A That is correct.

Q And you gave him the figure of 60 cents, is that correct?

MR. BERGEN: Objection, your Honor.

When? He still hasn't answered the question "when".

MR. BUTLER: I said "At all times".

2 THE COURT: He said, "At all times." Within that time frame. Listen, Mr. Bergen; it helps.

MR. BERGEN: I respectfully submit I do not believe that he testified that he gave it to him "At all times".

THE COURT: He hasn't answered the question yet.

BY MR. BUTLER:

Q Did you provide the 60-cent figure to the sales people during the period of January 1972 to August of 1973?

A Yes.

Q And did you provide to them an estimate of a dollar for taxes to be payable by the tenants and 25 cents to be payable by the landlord, for a total of $1.25?

A Yes.

Q During that same period of time.

A Yes.

Q And didn't you know that the sales people would use those figures in their dealings with prospective tenants?

A That is correct.

Q And you anticipated that, is that right?

A That is correct.

Q And you knew that the tenants would rely on those figures?

A Yes.

Q Mr. Feist, with regard to the financial aspects of the operation of the mall -- we are talking about the construction of the mall -- and during the same period, 1972 down to August 1973, the anticipated operation for expenses and income, were you involved in discussions relative to those issues?

A Yes.

Q And Don Faughnan was the comptroller of Feist & Feist, is that correct?

A That is correct.

Q And Ed Fraher was the heavy construction for the mall, is that correct?

A That is correct.

Q And those two gentlemen prepared financial data -- Ed Fraher with regard to construction, and Don Faughnan with regard to operation and expenses of the running of the mall, isn't that correct?

A That is correct.

Q And the financial information which they had, you reviewed, isn't that correct?

A Not necessarily.

Q I have here -- I want to see if I can make it simple -- about 50 documents which represent estimates, continuous estimates from '72 right up to August of 1973, and we reviewed those in our examination before trial.

Isn't this the type of information, detailed financial information which you were constantly reviewing?

MR. BERGEN: Objection, your Honor. I do not know what he is holding in his hand.

MR. BUTLER: These are all of the exhibits on the examination beore trial which were produced by Feist & Feist -- the financial information produced by Feist & Feist, all of which we went through, all of which is here. I do not want to go through each document, your Honor --

THE COURT: Show them to him and ask him if these are the kinds of exhibits that he was relying on. That is all you have to do -- one simple question. Give

them all to him.

(Mr. Butler hands to the witness who examines.)

THE COURT: All right, what is the question?

Q Mr. Mr. Feist, I have asked you to look at some 60-odd financial documents here. Are these the type of documents which you reviewed during 1972-'73?

A Some of them.

Q Is this the type of information which you had -- in other words, let us take one of these --

(Mr. Butler examines.)

MR. BUTLER: Your Honor, I am looking for one particular document that might solve all my problems.

Q I show you a document dated August 2, 1972 (handing).

(The witness examines.)

Q Was that a document prepared by Feist & Feist?

A It looks like one, yes.

Q Did the Staten Island Mall have anyone to prepare any documents other than for Feist & Feist -- financial information?

A Not that I know of.

Q Well, Feist & Feist prepared all of the financial information, isn't that correct?

A That is correct.

Q For the mall.

A That is correct.

Q For Blackfriars and Tottenham, isn't that right?

A That is correct.

(Mr. Butler hands to Mr. Bergen.)

MR. BUTLER: I am offering a memo from Don Faughnan to Irving Feist and John Feist dated 8/2/72 regarding Staten Island projects.

MR. BERGEN: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 9 was received in evidence.)

xx THE COURT: Where is Exhibit 8?

MR. BERGEN: It was not admitted, your Honor.

BY MR. BUTLER:

Q Mr. Feist, that is a memorandum from Don Faughnan -- I think we described him as comptroller of the company.

A That is correct.

Q And that memo is addressed to you. Do you recall receiving that memo?

A No, I do not.

Q Do you recall receiving the underlying inform-

ation?

A No, I do not.

Q In the normal course of business memos addressed to you, do you receive them?

A Normally, yes.

Q Is it the procedure for Mr. Faughnan to send you information?

A They usually sent me all forms.

Q All financial information regarding the mall?

A Normally, yes.

THE COURT: Does the plaintiff have a pretrial brief?

MR. BUTLER: Yes, your Honor.

MS. KAHLE: It was submitted.

THE COURT: Where did you submit it?

MS. KAHLE: I gave it to Mr. Bowes.

THE COURT: I am sorry to interrupt you.

Q Now the memo, to help you refresh your recollection about it, if I may, indcates that there are 627,000 square feet being used as a denominator; is that correct?

MR. BERGEN: If that is what the memo says, Mr. Butler, that is what it says.

MR. BUTLER: Well, it is not that simple.

A That is what it says.

Q At this time in August of 1972, the denominator, the 627,000 square feet includes the mall -- right -- 420,000 square -- right?

A Yes.

Q 5000 approximately for the kicsk -- right?

A Yes.

Q 80,000 for the convenience center -- right?

A No, I don't know if that is right.

Q May I show you another document to refresh your recollection, to see if that is correct?

MR. BERGEN: Does the memo you are showing him say that, Mr. Butler? That is what you are reading from.

MR. BUTLER: I am trying to get to the 627 figure.

THE COURT: Please, Mr. Bergen --

MR. BERGEN: Your Honor, I object to him reading --

THE COURT: If you have an objection, state it to me.

MR. BERGEN: Yes.

THE COURT: Don't give your adversary here directions or instructions.

MR. BERGEN: I object to Mr. Butler asking Mr. Feist a question about one document, whether the 80,000 figure is included there and then going to a completely different document to ask him whether the 80,000 figure is included.

THE COURT: All right. Moreover it is thoroughly and totally confusing, Mr. Butler.

MR. BUTLER: That is what I am trying --

THE COURT: I don't know what you are trying to do but you are certainly doing a great job of confusing everything.

MR. BUTLER: Your Honor, we have documents here which show --

THE COURT: I don't care what you have. You have to show me in some clear way. You are jumping all over the place.

(Continued on next page.)

2 Q Were you informed, did you have any dis-
3 cussion with Faughnan in or around August of 1972 re-
4 garding projections of expenses at Staten Island
5 Mall?
6 A I don't remember.
7 Q Do you recall having any discussions with
8 Mr. Faughnan --
9 THE COURT: I couldn't hear your answer.
10 Would you please.
11 THE WITNESS: Excuse me. I don't
12 remember.
13 Q The memo, Plaintiff's Exhibit 9, from Mr.
14 Faughnan, states:
15 "I think we should ask ourselves whether
16 it is economically feasible for our tenants to carry
17 such high cost."
18 Did you have a discussion with Mr. Faughnan
19 relative to that observation?
20 A I don't remember.
21 Q The $5.33 per square foot of cost which
22 he is making reference to, is that not cost over the
23 minimum rent?
24 A I don't know what he is referring to.
25 Q I ask you to take a look at this document,

Plaintiff's Exhibit 9.

A Could you repeat your question, please.

(Record read.)

A Yes, that is the cost over the minimum rent.

Q Isn't the composition of that $5.33 taxes, real estate taxes?

A It could be.

Q Look at the document, the second page. Does that refresh your recollection that taxes were included in that 5.33?

A No, it does not.

Q What is the figure for taxes?

A On this document?

Q Yes.

A $2.15.

Q A square foot?

A It's $2.15.

THE COURT: Does that mean a square foot?

THE WITNESS: Normally, your Honor, yes.

Q Now, if you were to subtract the taxes of $2.15, would most of the remaining from the $5.33-- would the balance be common area charges and utilities?

A I don't know what Mr. Faughnan had on the document.

Q Mr. Faughnan prepared these documents at your request, did he not.

A Not at my request, no.

MR. BERGEN: Your Honor, the document speaks for itself. I object.

THE COURT: Apparently it doesn't speak for itself. After you take 2.15 from 5.33, what does the balance represent, do you know?

THE WITNESS: No, your Honor, I don't know.

THE COURT: Next question, he doesn't know. Get a witness on here who does.

Q Does page 2 reflect estimated common area charges?

A Some of them, yes.

Q Okay, let's start where they do.

What charges in here would be included in common area charges?

A Cleaning, protection, snow removal, landscaping, repairs, maintenance and supplies. Those are the ones that I can pick out.

Q How about utilities? Wouldn't a portion of the utility bill go to common area charges?

A Possibly.

A Possibly.

Q About 30 per cent of it?

A I don't know what percentage.

Q Roughly 30 per cent?

A I don't know what percentage.

Q Some percentage?

A That's correct.

Q You said services: cleaning, protection and so forth. The estimate here is 1.22, is that correct?

A That's correct.

Q Repairs, maintenance, the estimate is 15 cents, is that correct?

A I would have to look again. Fourteen cents.

Q The next estimate you have there.

THE COURT: I can't hear the witness. If you have to have a little tete-a-tete wit him, why don't you take him out in the hall. It also helps to examine him before trial.

MR. BUTLER: We are getting the same answers now, your Honor. That's the problem we had. There is no one who can testify to this stuff.

May I have that?

Q So we have $1.22, 15 -- and these figures are $1.22 per square foot, is that correct?

A Yes.

Q And 15 cents a square foot?

A That's correct.

Q Insurance liability, 16 cents a square foot, correct?

A That's correct.

Q Promotional expenses, 11 cents.

A No. Promotional expenxes are not in common area.

Q General and administrative expenses.

A That's possible.

Q Twenty-one cents, right? And part of utility, right?

A Yes.

Q Doesn't that come to, no matter how you look at it, over $1.53 cents a square foot for common area charges?

A I don't have any figure here that says $1.53.

Q You have $1.21, you have 15, you have 11 --

THE COURT: I will take judicial notice. I can do arithmetic.

Q And part of the utilities.

A That's correct.

Q Real estate taxes of 2.15 a square foot, right?

A Is included in what?

Q Real estate taxes -- I am talking about common area charges over $1.50 and real estate taxes of over 2.15.

A That's what the document says.

Q Do you have any reason to believe that the figures in this document were not properly prepared?

A I never saw the document so I don't know how it was prepared.

Q This document was sent to you. We just went through that.

A That's correct. I don't remember seeing the document.

Q Mr. Faughnan called to your attention the fact that these figures were higher than in other shopping centers, did he not?

A I don't remember.

Q I ask you to take a look at the memo and the last page.

Have you looked at that?

A Yes, I have.

Q Do you recall now that Mr. Faughnan talked to you about the shopping centers in the area?

A No, I do not.

THE COURT: We will take our luncheon recess. That clock up there is 15 minutes slow.

2:15.

(Luncheon recess.)

AFTERNOON SESSION

(2.15 p.m.)

J O H N F E I S T , resumed.

THE COURT: Proceed.

MR. BUTLER: Thank you.

DIRECT EXAMINATION (Continued)

BY MR. BUTLER:

Q Mr. Feist, Plaintiff's Exhibit 9 indicates it was sent by Mr. Faughnan to yourself, as well as to Mr. Irving Feist (handing).

Is Mr. Irving Feist your father?

A That is correct.

Q Is Mr. Irving Feist the president of Feist & Feist?

A That is correct.

Q Is Mr. Feist the president of Blackfriars?

A That is correct.

Q Is Mr. Feist, Irving Feist president of Tottenham Realty?

A That is correct.

Q Did Mr. Irving Feist have any conversation with you regarding the information contained in Plaintiff's Exhibit 9 as to the cost of $5.33 over the minimum rent?

A Not that I can recall.

Q Did Mr. Irving Feist give you any instructions to inform the sales people of that fact?

A Not that I can remember.

Q Did you have any discussion with him regarding the economic feasibility of a tenant leasing space at the mall in view of such high cost?

A No.

Q Did you give any instructions to the sales persons to inform the prospective tenants that in addition to minimum rent they could expect such costs that are reflected on Plaintiff's Exhibit No. 9?

MR. BERGEN: Objection, your Honor.

THE COURT: On what ground?

MR. BERGEN: On the ground that Mr. Butler seems to be saying that those were the costs, and I believe the witness' testimony is that this was an estimate.

THE COURT: Overruled.

Q Did you give any instructions to your sales persons that they could anticipate the high cost as reflected on Plaintiff's Exhibit 9?

A I never remember seeing that memo so I gave no instructions.

Q You gave no instructions. And to your knowledge Mr. Irving Feist did not give any instructions, is that

correct?

A That is correct.

Q I show you a document which is dated October 16, 1972 from Mr. Fraher to Mr. Irving Feist, indicating a copy to yourself (handing).

THE COURT: Mr. But ler, I think it would help the record and it would certainly help the Court if you would number these documents and say "I show you Exibit number so-and-so, what is it?"

We have to read through three pages to see what exhibit he has in his hand.

MR. BUTLER: Exhibit 10.

(The witness examines.)

Q Is that a document prepared by Feist & Feist?

A It seems to be the type of one that would be prepared, yes.

Q And prepred for the mall?

A That is correct.

Q And prepared by a person who is employed by the mall and Feist & Feist, is that correct?

A Yes.

MR. BUTLER: I offer in evidence Plaintiff's Exhibit 10.

MR. BERGEN: No objection, your Honor.

THE COURT: What does it relate to?

MR. BUTLER: Your Honor, the common area charges of October 1972 are reflected in that memo, in that financial sheet, as well as the real estate taxes. That is a detailed report of estimated common area charges.

THE COURT: Received.

(Plaintiff's Exhibit 10 was received in evidence.)

xx BY MR. BUTLER:

Q I show you Plaintiff's Exhibit 10 and ask you if you received that document (handing)?

A I do not remember.

THE COURT: I did not hear you.

THE WITNESS: I do not remember.

THE COURT: Did you try to refresh your memory before you came here by looking over these documents?

THE WITNESS: Yes. We had hundreds of documents in this project, and I have thousands of copies.

THE COURT: Have you see that one before you came here today?

THE WITNESS: Have I seen that one before I came here today?

Yes, in the last week I have seen it.

Q Three pages in --

THE COURT: Is there a date on this document?

MR. BUTLER: Yes, Your Honor; it is dated October 16, 1972.

May it please the Court, can I give the Court a copy while I do this exercise?

THE COURT: It would help.

(Mr. Butler hands to the Court.

Q I show you a page which states:

"Staten Island Mall I-II, and Convenience Center, estimated income",

and I direct your attention to the column on the left-hand side which says:

"Prior to the opening of the third department store."

(The witness examines.)

Q I direct your area to the common charges --

MR. BERGEN: Your Honor, may I just stand next to Mr. Feist and look, because I do not have a copy of it?

THE COURT: Yes.

Q I believe the figure there is $1,161,000 for common area charges; is that correct?

A That is correct.

Q Now if I divide the square feet of the -- going

to the left-hand side -- of the mall, 427,000 square feet -- correct -- and the Convenience Center, 80,000 square feet -- correct? -- and the kiosk, 5000 square feet -- 5100 square feet, I would come up with 512,000 square feet of rentable space, is that correct -- 512,100, to be exact.

A It seems to be, yes.

Q And if you divide that into the common area of 1 million 161, you would have the square foot charge of common area expenses, is that correct?

A For those three pieces.

Q For common area -- yes, for those three pieces?

A No, because the Convenience Center is done different from the mall and the kiosk and the Center Court.

Q The Convenience Center is lower, is that right?

A That is right, it is a separate item.

Q But on this document it is included, isn't it?

A That is what the document shows.

Q So if you deduct 512 from 161 you get the common area expenses, is that right?

A Yes.

Q Okay. If you divide that you get $2.27 per square foot for estimated common area charges, isn't that correct?

A I would have to have a piece of paper to do that.

(Mr. Bergen hands to the witness.)

Q Well assuming my math is correct -- is that right, $2.27?

A If your math is correct -- I have to assume it is correct.

Q Now the kiosk --

THE COURT: What is the final figure?

MR. BUTLER: $2.27 a square foot.

Q The kiosk and the Center Court, 5100 square feet. Would you explain that to the Court, what that is?

A They are two different things.

Which one?

Q The kiosk and the Center Court which add up to 5100 square feet?

A The kiosks are small individual little -- like buildings that were put in the center of the mall. We put little candy operations --

THE COURT: Orange juice.

THE WITNESS: Orange juice, yes.

A (Continuing) And the Center Court -- we have a big stage in the center, the shopping center, and underneath the stage is an area of approximately 3600 rentable

square feet, and in that we have put little stores in -- that is the Center Court.

Q And the Convenience Center is on a separate parcel and has a food chain -- Food Fair or something like that?

A Acme.

Q Yes, but it is a separate parcel?

A That is correct.

Q At this time it is all being included together in terms of expenses and real estate taxes, is that right?

A Whatever the paper says, I don't know.

(Continued on next page.)

2 Q I show you the next page, at the top of
3 which there is a column for real estate taxes. Do
4 you see that?
5 A Yes.
6 Q The figure is $.296 million. Is that
7 correct?
8 A That's correct.
9 Q You divide that by 512,000 and by my calcu-
10 lator it comes out to be $2.53. Would you accept
11 that figure?
12 A Yes.
13 Q Yes?
14 A Yes.
15 Q That was going to be the estimated tax,
16 is that correct?
17 A No.
18 Q Weren't these estimated expenses?
19 A These were somebody's estimates. I don't
20 know how they arrived at these figures.
21 Q But these were estimated expenses for the
22 mall, right?
23 A They were done by somebody as an estimate.
24 THE COURT: Were you in charge of
25 this mall operation for your company?

THE WITNESS: I was in charge of the leasing and partial of the construction. I was not in charge of the financial.

THE COURT: Doesn't this have to do with the leasing?

THE WITNESS: Indirectly it does, but there were several estimates made by several different people. They weren't all made by the same people.

Q Do you have any estimate other than this, other than ones prepared by Mr. Fraher or Mr. Faughnan?

A Do I have?

Q Yes.

A Yes. I have my own in my own head.

Q In your own head?

A Yes.

Q And that's 60 cents on the dollar?

A Yes.

Q But you have no estimate prepared by anyone other than for this, right?

MR. NEWMAN: Other than himself.

Q Other than the documents here by Mr. Fraher and Mr. Faughnan?

A That's correct.

Q And Mr. Fraher was head of the construction department, is that right?

A That's correct.

Q And he reported to you?

A That's correct.

Q And Mr. Faughnan was head of the financial department, the controller?

A That's correct.

Q And he reported to you?

A No, he did not.

Q He didn't report to you?

A No.

Q Who did he report to?

A Mr. Irving Feist.

Q Did he provide you with information?

A Sometimes.

Q You are copied on almost everything. That whole stack of documents I showed to you --

THE COURT: Please, don't argue with the witness. Bring out your facts and hopefully you can bring them together and make an argument later.

MR. BUTLER: My apologies, your Honor.

Q You mentioned earlier that you had many, many meetings with Mr. Faughnan, Mr. Fraher, with

your father, and I believe at those meetings you had documents such as this, is that correct?

THE COURT: Referring to what exhibit?

MR. BUTLER: Plaintiff's Exhibit 10.

A That's correct.

Q And you reviewed those documents?

A Sometimes, yes.

Q At the meetings?

A Yes.

MR. BUTLER: I am showing the witness Plaintiff's Exhibit 11.

Q Have you seen that document before?

A Yes.

Q Is that a memorandum prepared by yourself?

A That's correct.

Q Is it sent to your father, I mean Irving Feist?

A That's correct.

Q And it is dated December 15, 1972?

A That's correct.

MR. BUTLER: I offer Plaintiff's Exhibit 11.

MR. BERGEN: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 11 was received in

evidence.)

Q Prior to December 15, 1972 do you recall having a conversation with Mr. Fraher relative to taxes, tenants' share of taxes, for the mall?

A Yes.

Q Do you recall such a conversation in which Mr. Fraher told you that he, Mr. Fraher, estimated taxes for the opening year to be $2.34 per square foot; the tenants' share of taxes would be 2.34 per square foot?

A I have a vague recollection that he told me that.

Q Now, this memorandum which is prepared is marked "confidential," is that correct?

A That's correct.

Q Plaintiff's Exhibit No. 11?

A That's correct.

Q Is that marked "confidential" so only the persons on here would receive the information?

A That's correct.

Q And that is Irving Feist and Don Faughnan?

A That's correct.

Q Was the information on this document conveyed to anyone else?

A Not that I know of.

Q Did you inform the sales people that you had received an estimate of the tenants' share of taxes of 2.34 a square foot?

A No. Because I felt it was totally wrong based on my getting an estimate of taxes on the project next door to us.

Q Now, let's go into that.

When did you get that estimate?

A While the mall was under construction. I don't remember the exact date.

Q How about August, 1970?

A I don't remember.

Q Are you talking about Korvettes?

A That's correct.

Q I show the witness plaintiff's Exhibit No. 12.

Have you seen that document before?

A Yes.

Q Was that document prepared by you?

A That's correct.

MR. BUTLER: It is dated, your Honor, 8/14/1970.

THE COURT: Do you offer it?

MR. BUTLER: I offer it in evidence.

MR. BERGEN: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 12 was received in evidence.)

xx THE COURT: Who is JAF?

THE WITNESS: That's me.

THE COURT: And who is Fraher?

THE WITNESS: Fraher was the head of the construction department.

THE COURT: Your employee?

THE WITNESS: Yes.

BY MR. BUTLER:

Q Now, Korvettes is what?

A It's a shopping center.

Q A store. How big is it?

A The Korvettes store itself?

Q Yes.

A Over 100,000 square feet.

Q The mall is an enclosed mall?

A That's correct.

Q Covering what, over 600,000 square feet?

A That's correct. But the Korvettes center is more than Korvettes.

Q But Korvettes is not an enclosed mall, is it?

A No, it's an open mall.

Q It's an open mall, right?

A Yes.

Q How did you check on Korvettes tax?

A We have the mortgage on the project. I checked to see what the taxes were.

Q This is the entire basis for your belief that taxes at Staten Island Mall might be $1 to $1.25?

A That's correct.

Q The Korvette estimate in 1970?

A That's correct. There was nothing else that I knew of that you could go for.

Q You are an expert in the area, is that correct?

A That's correct.

Q Isn't it the procedure when you are applying for a mortgage for such a large building, $25 million or more, to estimate your taxes?

A Myself?

Q Yes.

A No, I did not apply for the mortgage. I had nothing to do with the financing of this project.

Q I am talking about the financial information.

A I did not supply the financial information for this project.

Q Mr. feist, you are an expert in the real estate business. You are an expert in mortgaging, is that correct?

A That's not correct.

Q Feist & Feist?

A That's correct.

Q Isn't it the proper procedure in order to determine your taxes to estimate your tax assessment, isn't that correct?

A In a normal mortgage?

Q In a normal mortgage.

A That's correct. This was not a normal mortgage.

THE COURT: Mr. Feist, where was Korvettes in relation to the Staten Island Mall?

THE WITNESS: It was one road in between us. Right on the other side of it.

THE COURT: The same side of the street?

THE WITNESS: Platinum Avenue.

Q In order to estimate your assessment you need the cost of the building, right?

A That is correct.

Q And the cost of the land?

A That's correct.

Q And the cost of the improvements?

A That's correct.

Q Given that total value of all of your improvements and the cost of the land you have the total cost of the project, is that correct?

A That's correct.

Q And New York City assesses, as I understand it, on the value of the building, is that correct?

A I don't know about their assessments. I have no idea about tax assessments.

Q Do you have people prepare assessments?

A That's correct.

Q They would take the value of the building and then they would estimate what the assessment would , isn't that correct?

A That's correct.

Q And then they would apply a tax rate to it, isn't that correct?

A That's correct.

Q Either the present tax rate or a higher tax rate, because it is for the next year, isn't that

correct?

A That's correct.

Q Isn't that what Mr. Fraher did here, Plaintiff's Exhibit 10, in arriving at his real estate estimate?

A I can't tell you. There are two figures here. I can't tell you how he got these figures.

Q Did you ask him?

A No, sir, I did not.

Q When he told you the taxes would be $2.34, didn't you ask him?

A He didn't tell me this.

Q You just testified that Mr. Fraher --

A I was talking about this paper.

Q Mr. Fraher told you that in his estimate taxes were $2.34, isn't that correct?

A He said he had heard this. I don't know where he got it from, and I knew where I got my information from.

Q Did you ask him?

A I don't remember if I asked him.

Q Did you inquire?

A I am pretty sure I inquired, yes.

Q And what did you determine?

A I determined that the Korvette taxes were around 85 cents a square foot.

Q In 1972?

A That's correct. And that's the figure that I stood on. There was no reason to assume anything else. There was no assessment on our property and I didn't have the slightest idea what they were going to do.

Q You rejected all of the information, financial information, which you had been provided by Mr. Fraher and Mr. Faughnan?

A I don't understand your question.

Q Well, Mr. Faughnan and Mr. Fraher were both providing you financial information which showed --

A They weren't providing it for me.

Q You are copied on those documents.

A I am copied on hundreds of documents. I don't read every document I am covered on.

THE COURT: Please, leave the arguments until later.

Q Now, you say here:

"If we are going to have taxes like this in addition to the common area and everything else, we are certainly going to have problems with our tenants."

Did you take any action with regard to the sales people to see what the nature of your problems might be with regard to common area charges and taxes?

A I don't remember.

Q You say:

"If we are going to have taxes like this in addition to the common area, we are certainly going to have problems."

Now, didn't you know at that time that common area costs were going to be over 60 cents a square foot?

A No, I did not.

(Continued on next page.)

2 Q Mr. Feist, I show you a document marked
3 Plaintiff's Exhibit 13, which is undated (handing).
4 (The witness examines.)
5 Q Is that your handwriting at the top of that
6 document?
7 A That is correct.
8 Q And it says "File", I believe?
9 A That is correct.
10 Q "Faughnan". Is that a document prepared by
11 Feist & Feist?
12 A That is correct.
13 Q And does that document refer to the Staten
14 Island Mall?
15 A Yes.
16 (Mr. Butler hands to Mr. Bergen.)
17 THE COURT: Instead of handing it to Mr. Bergen,
18 Mr. Butler, why don't you say "I offer Exhibit 13" so that
19 the record will reflect what you are doing, or at least
20 what you are trying to do.
21 MR. BUTLER: I offer Plaintiff's Exhibit 13.
22 THE COURT: Say it when you hand it to him.
23 (The Court examines.)
24 THE COURT: Who underlined Paragraph 1 on
25 this?

MR. BUTLER: I did. your Honor -- to call it to your attention.

THE COURT: All right.

(Plaintiffs's Exhibit 13 was received in evidence.)

xx MR. BUTLER: Your Honor, you may keep that one and I will hold this one -- I think it might be belpful.

BY MR. BUTLER:

Q I show you Exhibit 13 which purports to be notes to a cash flow statement and a cash flow statement. Do you see that?

A Yes.

Q Is that what that document is?

MR. BERGEN: Your Honor, I object to him referring to it as a "statement". It is a cash flow projection -- just so that we have the record clear.

THE COURT: That is what it says "cash flow projection".

Q Did you review that document?

A Did I review that document?

Q Yes.

A Last week I did.

Q At or about the time that it was prepared?

A I don't remember.

THE COURT: When was it prepared, do you know?

Q That document, in the first few paragraphs refers to -- if we may go back -- "It is assumed that the mall will open some time in April."

Was that memo prepared some time prior to April of 1973?

A I don't know.

Q Was it prepared before the mall was opened?

A I do not know when it was prepared.

Q I am just asking you, was it prepared prior to April 1973?

A There is no date on it.

MR. BERGEN: Your Honor, we will stipulate that it was prepared some time before April of 1973. It seems to refer to April of 1973.

THE COURT: Obviously it does.

Q Do you recall reviewing the cash flow statement?

A No, I do not.

Q But do you recall receiving it?

A No, I do not.

Q But you did receive it.

A I don't remember.

Q Well your initials -- your name is on here -- not your name -- your handwriting.

A That is correct.

Q Does that refresh your recollection that you did receive it?

A No, it does not.

Q If you had a cash flow statement would you have reviewed it?

A No, I would not.

Q Now turning to the cash flow statement -- and it is a very bad copy but this is what we received from the Staten Island Mall -- I call your attention to the line from disbursements on down to here (indicating).

MR. BERGEN: What page is that on?

MR. BUTLER: This is on the first page of the document itself

Q Will you take a look at that for a second?

(The witness examines.)

Q Now does that section contain an estimate -- a projection of your operating expenses, including interest and taxes?

A Yes.

Q If I add up all of the expenses, excluding interest and taxes, I would have the common area expenses, isn't that correct?

A You might have an estimate.

Q Right, an estimate of the common area expenses.

A Yes.

Q I have done that, and for 12 months my figure comes to $1,202,000, for a 12-month period from 5/73 on though.

If I divide that 420,000 do I have an estimate of the common area expenses, per square foot?

A Well, yes.

Q Yes. If you do that the figure is $2.86 a square foot. Would that be correct -- that is an estimate.

A I have to assume your figure is correct, yes.

Q And you have --

MR. BERGEN: Your Honor, may we have it clear on the record what of the columns with regard to the disbursements -- what are the items that you totaled up, Mr. Butler?

MR. BUTLER: We totaled the items other than for real estate taxes and interest.

Q And you did have this document in your possession, isn't that correct? -- and I am referring now to Plaintiff's Exhibit No. 13?

A That is correct.

Q Did you have any reason to believe that the

estimate of expenses referred to on this document, Plaintiff's Exhibit 13, were not accurate?

A I don't ever remember seeing the document.

Q I show you Plaintiff's Exhibit No. 14 (handing).

A (The witness examines.)

Q Is that a document prepared by Feist & Feist for the Staten Island Mall?

A Yes.

Q Is that date on there around January 1973?

A Yes.

Q Is that Irving's handwriting?

A That is what it looks like.

Q Irving Feist's handwriting?

A That is correct.

MR. BUTLER: I am offering to counsel Plaintiff's Exhibit 14 in evidence to review (handing).

MR. BERGEN: No objection.

(Handed to the Court.)

THE COURT: Received.

(Plaintiff's Exhibit 14 was received in evidence.)

xx

Q I ask you with respect to Plaintiff's Exhibit 14 whether you recall reviewing that document (handing)?

A No, I do not.

Q You were having discussions in January 1973, were you not, regarding the financial aspects of the mall?

A I did not handle the financial aspects of the mall.

Q You were having discussions regarding the financial aspects?

A I did not handle the financial aspects.

MR. BUTLER: I move to strike that answer as not responsive.

THE COURT: Yes, strike it out, it is not responsive -- and I am not impressed with your evasions.

Q Were you having discussions regarding income and expenses or operating the mall in 1973?

A Expenses, yes.

Q And possible income, projected income?

A Yes.

Q And expenses?

A Yes.

Q And you were having those discussions with Mr. Fraher and Mr. Faughnan, is that right?

A No, I did not.

Q You did not discuss this with Mr. Faughnan?

A No, I did not.

Q You earlier testified that you did have meetings with Mr. Faughnan?

A I had meetings but I did not discuss these things with him.

Q You did not discuss the financials with Mr. Faughnan?

A No.

(Continued on next page.)

Q And did you discuss it with Mr. Fraher?

A Yes.

Q You discussed it with Mr. Fraher.

On the last page of this document there is a figure for real estate taxes, and estimate. The taxes include Mall 1, the convenience center and the land for Mall 2 and 3 and the parcel northwest corner. Do you see that figure?

A Yes.

Q Did you see that estimate of what the taxes were going to be for the Staten Island Mall in January, 1973?

A No, I did not.

MR. NEWMAN: Objection. It is not Staten Island Mall. It is specifically defined.

Q It says Staten Island Mall on this piece of paper, is that correct?

MR. BERGEN: I object, your Honor. It specifically says Mall 1 and convenience center, including the land for Mall 2 and 3 and parcel northwest corner.

MR. BUTLER: That's what I said.

MR. BERGEN: I object.

MR. BUTLER: That's exactly what I said.

MR. BERGER: No, you said Staten Island Mall, Mr. Butler.

THE COURT: It speaks for itself. I can read the English language and that is what it says, Mr. Butler.

BY MR. BUTLER:

Q And isn't the land for Mall 2 included in the taxes which the present tenants pay?

A I think so.

Q Yes, it is. And isn't the land for Mall 3 --

A Yes.

Q -- included in the taxes which the tenants at Staten Island Mall pay?

A Yes.

Q And isn't the northwest parcel included in the taxes which the tenants pay?

A Yes.

Q So that every single item on there except for the convenience center is included and what the taxes which the people pay today are, right?

A I don't understand your question.

MR. BUTLER: Read the question back, please.

(Record read.)

MR. BUTLER: It sounds a little garbled.

Q The tenants at the Staten Island Mall today and from the opening of the mall pay taxes on Mall 1, right?

A Yes.

Q The land for Mall 2?

A Yes.

Q Land for Mall 3?

A Yes.

Q The northwest parcel?

A Yes.

Q The convenience center is taxed separately, is that correct?

A That's correct.

Q Okay. Now, if I take this figure of 2,324 million and divided it by the mall's square feet of 420,000, or to use your figure, 430,000, which I saw today, and 80,000 for the convenience center, that's 500,000 square feet, if I divide 500,000 square feet into that figure I would get the square foot charge, is that correct?

MR. BERGEN: Objection, your Honor. He just said the convenience center is not included and now he is including it.

MR. BUTLER: I am including it for the purposes of determining a square foot charge and I am including the square feet of the convenience center.

A The convenience center is a separate tax parcel.

Q Isn't the tax lower? Isn't the square foot tax on the convenience center lower than that on the mall?

MR. BERGEN: Objection on the ground of relevancy, your Honor.

MR. BUTLER: What we are saying here, your Honor, if you take --

THE COURT: Please go ahead and do it. I haven't ruled on anything. There hasn't been an objection.

Answer the question. Exclusive of the convenience center, what's the square foot cost shown on that thing? Work it out while I am taking a recess.

You should have done all this arithmetic ahead of time.

(Recess.)

MR. NEWMAN: Your Honor, we will stipulate that if you divide the number which Mr. Butler

pointed out, 2,324 million, by what appears to be the logical divisor, 510,000, one gets $4.55. We object to the presentation, however, on the grounds that the document is confusing because if you look to the previous page and the one before that you see identical headings to the comma with dramatically different numbers from 1,296 million to 2.324 million. So we object as to the relevancy and materiality and stipulate as to the mathematics.

THE COURT: Overruled.

MR. BUTLER: Your Honor, excuse me.

I didn't get your figure which you were stipulating to. How much did you come up with?

MR. NEWMAN: $4.55.

Q And that was the estimate for taxes for the mall tenants per square foot, $4.55, isd that correct?

A That's correct.

Q And that was in January, 1973?

A Yes.

Q Now, at the time the mall opened in August, 1973, what was the occupancy in percentages?

A The day it opened?

Q Yes. Leases signed.

MR. NEWMAN: Your Honor, those terms are not synonymous. Which one is it?

MR. BUTLER: Leases signed as of the opening --

THE COURT: The objection is: "I object to the form of the question."

Go ahead.

A I don't remember.

Q Was it approximately 50 per cent?

A I don't remember.

Q I have here a figure as of August 10, 1973 on Plaintiff's Exhibit No. 7 which I calculated was 58 per cent. Does that seem about right to you?

THE COURT: For what? Fifty-eight per cent of what, for what?

MR. BUTLER: Fifty-eight per cent of the mall being leased as of the opening date.

A I don't remember.

Q Now, prior to April of 1973 were you having problems leasing the mall?

A Not that I can remember.

Q Now, in this memorandum which you sent to the file, Plaintiff's Exhibit 13, it states:

"The obvious problem" --

THE COURT: I have read it. Put your questions. I can quote it. "The obvious problem is lack of tenants" ---

Q Did you discuss this with Mr. Faughnan --

A Not that I remember.

Q The problem?

A Not that I can remember.

Q Did you discuss it with Mr. Fahrer?

A Not that I can remember.

Q Did you take any steps to expedite the leasing of the mall?

A We were always trying to expedite leasing of the mall.

Q When Magnaleasing entered into the lease on April 26, 1973, could they have known what the common area charges were going to be?

A Could you repeat that, please?

(Record read.)

A Could they have known what the common area charges were going to be?

Q Right.

A I didn't know what they knew. I didn't negotiate the lease.

Q All the information regarding common area

charges was in your possession, isn't that correct?

A That's correct.

Q And you started entering into contracts, is that correct?

A That's correct.

Q And that information wasn't made public, was it?

A Not that I know of. That information changed from day to day.

Q Now, the lease states, and I am quoting now from the lease, section 5.3, "Common area charges," and it states:

"For purposes of the period from the commencement date to the date the Landlord furnishes the first statement to Tenant, Landlord's estimate of Tenants' portionate share of common area charges shall be 60 cents per annum per square foot of floor space in the Demised Presmises."

I offer as an exhibit the lease, as Plaintiff's Exhibit No. 15.

MR. BERGEN: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 15 was received in evidence.)

xx

2 MR. BERGEN: May I just look at that for a
3 minute, Mr. Butler?
4 (Mr. Butler hands.)
5 THE COURT: You may look at it afterwards.
6 We will strike it if it isn't the right one. There are
7 other things to do.
8 (Mr. Butler hands to the Court.)
9 THE COURT: What do you direct my attention to?
10 MR. BUTLER: 5.3(c), your Honor, which is the
11 common area charges -- where that piece of paper is.
12 THE COURT: (After examining) You say 5.3(c)?
13 MR. BUTLER: Let me give it to you this way,
14 your Honor --
15 THE COURT: All right, I will permit it.
16 MR. BUTLER: It is on the bottom of page 13
17 and the top of page 14.
18 THE COURT: (After examining) All right, go
19 ahead.
20 BY MR. BUTLER:
21 Q Now the commencement date is the date of the
22 opening of the mall, is that correct?
23 A That is correct.
24 Q And the date on which a first statement was to
25 be sent to a tenant was to be some time after January 31 --

maybe April -- is that correct?

A That is correct

Q So we are talking about common area charges being -- your estimate for common area charges being 60 cents for the period maybe from August 9th to April 30th.

A That is correct.

Q And that is what -- five -- nine months.

Now did you inform your sales people to inform tenants that they would pay common area taxes on a proportionate basis?

MR. NEWMAN: Objection as to form -- common area taxes?

MR. BUTLER: Did I say that?

(Record read by the reporter.)

MR. BUTLER: I am sorry.

Q Did you inform the sales people that the tenants would pay common area charges on a proportionate basis?

A Yes.

Q And did you inform the sales people that they advise the tenants that they would pay taxes on a proportionate basis?

A Yes.

Q And you knew that they would convey that to the tenants, isn't that correct?

A Yes.

Q At the time of this lease, which was signed April 26 by Magnavox -- I mean Magnaleasig, guaranteed by Magnavox, and on May 4th by yourself -- that is stipulated to -- do you know what the occupancy of the mall was?

A No, I do not.

Q Would you accept our figure that as of May 4th it was approximately 50 per cent leased?

MR. BERGEN: Objection, your Honor. He referred a few minutes ago to occupancy. I do not think the mall was even opened.

MR. BUTLER: Occupancy being leases signed.

Q Do you accept that -- about May 1st of thereabouts you had 50 per cent leased?

THE COURT: '73?

MR. BUTLER: '73, your Honor.

A I don't remember.

Q Well would you accept that figure? We arrived at those figures by adding up all the leases.

A No.

Q In determining what Magnaleasing's common area charges were going to be, an estimate of that, didn't you have to know what the occupancy was going to be of the mall?

A I did not have to know what the occupancy would be until we were ready to send bills out.

Q Well, the 60-cent figure which you have in your lease is based on a fully-occupied mall, is it not?

A Yes.

Q In other words, you are saying here that on 420,000 square feet of leaseable space the commin area charges will be cents which is then times 420 which would be roughly around 300,000 -- is that correct?

MR. BERGEN: Objection, your Honor. The lease speaks for itself. It says what it says.

Q If only half the mall is leased -- right -- wouldn't Magnaleasing's proportionate share be twice 60 cents? Wouldn't it be $1.20?

THE COURT: I will take judicial notice that it would be that -- the proportion is doubled.

Q Was that at the time you prepared this lease and gave it to Magnaleasing, that the occupancy was a factor in determining your figure -- isn't that correct?

A It was a factor determining the figure when we finally sent out the bills --

Q I am talking about the time of the lease?

A The figure in the lease is a minimum figure, minimum charge. It could have been less, it could have

been more. We didn't know what it was going to be.

Q Didn't you state that the common area charge was your best estimate --

A "Guesstimate", I said.

Q Not "guesstimate" -- let us put that away -- best estimate.

Do you deny saying that was your best estimate?

MR. BERGEN: Can we have when and where?

We object, your Honor.

THE COURT: It would help. Maybe the Court of Appeals can find out where and when, because I am not going to dig through here and search for it.

Q I show you Plaintiff't Exhibit 16, which is a letter from you, John Feist, to Leonard Schonfeld --

THE COURT: Just say "I show you Exhibit 16." If you will do that we will save five minutes.

MR. BUTLER: I show Plaintiff's Exhibit 16 to Mr. Bergen, to be introduced in evidence (handing).

(Mr. Bergen examines.)

THE COURT: Received.

(Plaintiff's Exhibit 16 was received in evidence.)

xx

BY MR. BUTLER:

Q In reply to Mr. Schonfeld's complaints, which,

as I recall, were also 60 cents and a dollar, did you --

MR. NEWMAN: Objection to Mr. Butler testifying as to what he recalls Mr. Schonfeld said.

THE COURT: The objection is that the letter speaks for itself.

MR. BUTLER: There are two letters --

THE COURT: That is a good objection.

MR. BUTLER: The letters are here, your Honor --

THE COURT: I have read it. Dont' ask him what it says. I have read it.

Q I show you Plaintiff's Exhibit No. 17, Staten Island Mall I Estimates (handing).

(The witness examines.)

Q Is that your handwriting on that document?

A That is correct.

Q Did you receive that document?

A I don't remember.

Q Did you review the document?

A I don't remember.

Q Did you look at all the pages in it?

A Yes, I did.

MR. BUTLER: I show Mr. Bergen Plaintiff's Exhibit 17 (handing).

MR. BERGEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 17 was received in evidence.)

xx (The Court examines.)

THE COURT: All right, proceed.

BY MR. BUTLER:

Q I show you the last three pages of Plaintiff's Exhibit 17 and ask you if those are breakdowns of common area expenses -- estimated (handing).

A Yes.

Q Is that just for the mall, the breakdowns themselves?

A It says "Staten Island Mall" (handing to Mr. Butler.

Q No utilities are included in the breakdown, is that correct (handing)?

A (After examining) Yes, it says "electrical".

Q "Electrical" what?

A "Supplies and contract, electrical."

Q Supplies?

THE COURT: It seems to me this is getting extremely repetitive.

Do you have to put every last estimate in that was made to make your case?

MR. BUTLER: No, your Honor.

THE COURT: You estimated this case at two days, and I am going to hold you to it.

MR. BUTLER: This is the last one we have, your Honor.

Q I am talking about this document containing any estimates for utilities -- the use of utilities, which would be used in the mall, in the common area part?

A It could be under "electrical".

Q But there is no sewerage, no HAVC, which is air-conditioning or anything like that?

MR. NEWMAN: Objection.

Hasn't Mr. Butler stipulated out the utility portion of this?

THE COURT: Overruled.

Q So that the total common area estimated at this time is $856,000, just for the mall, is that right?

THE COURT: What time are we talking about?

MR. BUTLER: This was prepared at or about the time, around 1/73.

MR. BERGEN: May I have what that is based on, Mr. Butler?

Q Will you compare Plaintiff's Exhibit 14 with Plaintiff's Exhibit 17?

A (After examining) It seems to be the same.

Q The same information. the same date.

A Yes.

MR. BUTLER: Around January 1973, your Honor.

Q Your estimate of common area charges on this sheet-- this work sheet, of detailed costs is 856,000, divided by 420,000, is that correct?

A Yes.

Q And that doesn't include utilities -- HAVC, sewerage --

THE COURT: I don't have a calculator. How does that come out?

MR. BUTLER: $2.04.

THE COURT: Thank you.

MR. BUTLER: And without utilities.

Q The utilities, to make it clear -- the utilities which the common area uses -- gas, light, elevators; is that correct?

A Sewerage, yes.

Q And that is a factor which is not included in there?

A That is correct.

MR. BUTLER: Your Honor, I think I am almost finished with Mr. Feist -- if I could have one minute to

double check my notes.

(Mr. Butler examines.)

Q Mr. Feist, do you know whether in 1972 when Magnavox and Magnaleasing were negotiating with you that they could have determined what the estimated tax for the mall would be?

A Could they have determined themselves?

Q Yes.

A I would assume they could.

Q Was the mall completed?

A In 1972? No.

Q Was the cost of the building a public figure?

A No.

Q Was the cost of the land a public figure?

A I don't know.

Q Well, what you paid for the land, was that a public figure?

A I don't know.

Q Was the cost of the improvements a public figure?

A I don't think so.

Q Was the property assessed as unimproved land in 1972?

A That is correct.

Q Didn't Magnavox have to have all that information in order to determine what the assessment might be?

A That and they mght have gotten it from other shopping centers in the area.

Q Had they chekced in other shopping centers in the area?

THE COURT: Isn't that an argument, what they would have to have?

MR. BUTLER: Okay, your Honor.

The information was not available, there was no way to determine it.

THE COURT: That is a fact -- you establish that. Whether they would have to have it is an argument.

MR. BUTLER: I have no further questions of Mr. Feist, your Honor.

THE COURT: Cross-examine.

CROSS EXAMINATION

XX BY MR. NEWMAN:

Q Mr. Feist, in 1972 did you personally know what the real estate taxes would be on a fully assessed mall when it came into existence?

A No.

THE COURT: Sustained. It is obvious.

Go on to the next one.

MR. NEWMAN: Your Honor, Mr. Butler has called Mr. Feist as his witness.

THE COURT: I don't care who called him as his witness.

Q Mr. Feist, in 1972 did anyone in Feist & Feist know what the real estate taxes would be on a fully assessed shopping center?

MR. BUTLER: I am going to object to that question, your Honor. Of course he is leading the witness, and the second thing --

THE COURT: Well, he has a right to lead on cross, but it is obvious, unless he can foretell the future.

MR. NEWMAN: I agree, your Honor. That is probably what this case is about.

THE COURT: OH, come on, ask questions -- some sensible ones.

Q When did you personally ~~find~~ out that there was in existence an estimate in the vicinity of $2.34 per square foot per year for future real estate taxes?

A When Mr. Fraher spoke to me about it.

THE COURT: When was that?

THE WITNESS: Excuse me?

THE COURT: When was that? Speak up, please.

THE WITNESS: I don't know the exact date, your Honor.

THE COURT: Why do you sit there when I cannot hear you?

Don't you want me to hear you?

THE WITNESS: Yes, sir.

THE COURT: Speak up.

Q Was that in or about December 1972?

A Yes.

Q What was your reaction when you heard that estimate from Mr. Fraher?

A I did not believe it.

Q Why not?

A Because wee had checked with adjacent properties and the taxes were not anywhere near that figure.

Q Do you know how long after that time, December --

THE COURT: Did you check any other property other than Korvettes'?

THE WITNESS: We checked some of the surrounding area.

THE COURT: Which ones?

THE WITNESS: Of the shopping area -- I don't remember which ones.

Q Do you know how long after you heard that in or

about December of 1972 that the assessment came down on the shopping center?

A Will you repeat that?

(Question read by the reporter.)

A I don't understand the question.

Q In or about February of 1973 did the City of New York assess the structure known as Staten Island Mall?

A That is correct.

Q What was your reaction to that assessment?

MR. BUTLER: Your Honor, I am going to object to that, to the reaction.

THE COURT: Sustained.

What the date of the assessment?

MR. NEWMAN: February of 1973, your Honor.

Q Has the Mall commenced certiorari proceedings in connection with the tax assessment imposed by the City of New York?

MR. BUTLER: Objection.

It is stipulated to, your Honor.

THE COURT: Sustained.

Q In the year 1970, by the way, was the Korvettes shopping center that you looked at, as you testified, was that then a fully-completed structure?

A Was that fully completed?

Q Yes.

A Yes, it was fully completed.

Q Was it fully assessed at that time?

A Yes.

Q So that between 1970 and 1972 the increase in taxes would have been a function of the tax rate increase?

A Yes.

(Continued on next page.)

2 Q What do you understand to be embraced by
3 the term "the Staten Island Mall"?
4 A Macy's, Sears, the stores in between, the
5 convenience center and the northwest parcel.
6 Q By the stores in between are you referring
7 to the covered mall?
8 A That's corewxr.
9 Q What we sometimes call the mall?
10 A That is correct.
11 Q But less than the Staten Island Mall?
12 A That's correct.
13 Q Do you happen to know approximately how
14 many square feet Macy's occupies?
15 A Approximately 230,000.
16 Q Approximately how many square feet does
17 Sears occupy?
18 A Approximately 185,000.
19 Q The original estimates for square footage
20 of the mall itself?
21 A Approximately 430.
22 Q In other words, then Sears and Macy's by
23 themselves are approximately half of what you define
24 as the Staten Island Mall?
25 MR. BUTLER: I object, your Honor.

Q Is that correct?

A That is correct.

THE COURT: Overruled.

Q Mr. Feist, I show you Plaintiff's Exhibit 6, about which you earlier testified. I call your attention in particular to that column in the middle, "Leases out to tenants," and the percentage states 44.68 per cent. In or about 1972, for that matter, in the one year from August of 1972 to August of 1973, approximately what percentage of leases that were out to tenants were ultimately consummated?

A Approximately 95 per cent.

Q Ninety-five per cent?

A That's correct.

Q How did you regard the status of a lease that was out to tenant?

MR. BUTLER: I object, your Honor, as to his mental process of how he regarded it.

THE COURT: Sustained. What is a lease that is out to tenant? What are you talking about?

THE WITNESS: A lease that is out to a tenant is a lease that has been agreed to by both parties and a lease has been sent out or has been sent out for signature.

THE COURT: But not signed?

THE WITNESS: Not signed.

THE COURT: Not an executed lease?

THE WITNESS: Not an executed lease, but a totally agreed-to lease.

THE COURT: Oral, unbinding. Go ahead.

Q With respect to those leases indicated on this exhibit marked "Leases out to tenants," were your leasing representatives free to lease the space represented by such leases?

A No, they were not.

MR. BUTLER: Objection, your Honor, unless he can establish that there were instructions or he can establish that that space was not leased. They are free to do anything they want to do.

MR. NEWMAN: I will be glad to inquire as to whether there were instructions.

Q With respect to those leases demonstrated by your organization as "Leases out to tenants," did you issue instructions to your leasing people as to how to treat that space?

A That's correct.

Q What were those instructions?

A That space was considered leased and was not to be offered to any other tenant.

Q Does that mean that a leasing representative could not lease the space represented by a lease that had been sent out to a tenant?

MR. BUTLER: Objection, your Honor. That calls for a conclusion.

THE COURT: Sustained.

Q In other words, did you regard leases out to tenants as leased?

A Yes.

MR. BUTLER: Objection, your Honor. The question has been asked and answered.

THE COURT: Yes.

Q In 1972 had s single dollar been expended for common area charges?

A No.

Q Did you know what common area charges would be?

A No.

Q Did anyone within Feist & Feist know what common area charges would be?

A No.

Q Did anyone within defendant Mall, Black-

friars or Tottenham in 1972 know what common area charges would be?

A No.

Q Was there any way of knowing?

A No.

Q In 1972 did anyone within Feist & Feist know what future real estate taxes would be?

A No.

MR. NEWMAN: No further questions.

REDIRECT EXAMINATION

BY MR. BUTLER:

Q You just stated, if I made notes correctly, no one knew what their common area charges would be and you had no way of knowing. Isn't it true that Feist & Feist manages closed malls?

A That's correct.

Q And that Feist & Feist in the management of those malls knows what the expenses for operating the malls are, isn't that correct?

A Up until the time Staten Island Mall was built we did not have an enclosed mall. We do now.

Q In 1972 --

A We did not have an enclosed mall.

Q You had outside malls?

A Open malls.

Q Open malls. And did you have there expenses?

A That is correct.

Q Did you have engineers at Feist & Feist who were calculating expenses?

A We had people calculating expenses.

Q And on an enclosed mall they would calculate by cubic feet how much air conditioning you would need, isn't that corrrect?

A Approximately.

Q And they would know by the outlets you had at the mall, right?

A That's right.

Q How much electricity you would be using?

A That's right.

Q By the elevators they would know how much electricity you would be using based on the information from experience and all engineering books which are available, isn't that correct?

A Those are all estimates.

THE COURT: They are projections.

THE WITNESS: They are projections, correct.

Q But from engineers based on presently available information of costs as of that very date, right?

A That's correct.

Q So they knew how much electricity, an estimate of how much electricity was going to be used based on the number of outlets --

THE COURT: That's enough. Next question.

Q And did your people go through that process to arrive at their estimates?

A We went through it many times.

MR. NEWMAN: One or two more questions, your Honor.

RECROSS EXAMINATION

BY MR. NEWMAN:

Q Mr. Feist, isn't it a fact the Arab oil embargo of 1973 significantly affected utility charges and therefore common care charges at the mall?

A That's correct.

Q Had you predicted that prior to December 31, 1972?

A Did we predict it?

Q Did you predict the Arab oil embargo?

A No, I did not.

REDIRECT EXAMINATION

BY MR. BUTLER:

Q The Arab oil embargo only affected utilities, isn't that correct, if at all?

A It affected other things. It affected the cost of snow removal by the increase in gasoline.

Q But you had contracts for labor, you had contracts --

A Those change.

MR. NEWMAN: Objection as to form. When?

Q Utilities is a portion of co[illegible]n area?

A That is correct.

Q Can you tell me how many cents you would attribute the Arab embargo to?

A I couldn't tell you how many cents, no.

THE COURT: Do you have the bills before and after for utilities?

THE WITNESS: Yes, sir, we do.

THE COURT: Tell me what the difference is tomorrow morning.

We will recess now until tomorrow morning at 10 o'clock.

(Adjourned to March 23, 1976, at 10 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Dale Kelly	16	39		
John Feist	44	135		

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MAGNALEASING, INC.,

vs. 74 Civ. 5593

STATEN ISLAND MALL, et al.

New York, March 23, 1976;
10.00 o'clock a.m.

(Trial continued.)

- -

MR. BUTLER: Your Honor, we have in the box the assessor, and this is Corporation Counsel from the City of New York who would like to address the Court, if he may, with regard to this matter.

MR. ROSARIO RENDA: Your Honor, the Tax Commission of the City of New York was subpoenaed as a witness, and I am only here in the event that the procedures and the internal records of the Tax Commission or the assessor become subject to litigation -- come out of the litigation, because I believe those internal procedures in arriving at the assessment are protected, and if Mr. Vomero is asked to testify as to this matter it may be outside the scope of his authority, and it may also may be prejudicial to the City.

The City has no objection to Mr. Vomero testifying as to any assessment in any particular year.

THE COURT: On what basis do you claim privilege?

MR. RENDA: No, your Honor, it is not privilege that I claim. I claim that it is internal and not proper.

THE COURT: So what? Go ahead. I will rule on it as it comes out.

- -

R A Y M O N D A. V O M E R O , called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Vomero, would you be kind enough to state your position?

A I am assessor in charge of the Staten Island, Borough of Richmond, Staten Island, Real Property Assessors' Department of the Finance Administration of the City of New York.

Q And do you have the records of the assessment rolls?

A We have the records -- I have a record here. We have records at the office.

Q The record you have is for what year?

A 1970-'71.

Q And do you have your record for the Korvette Shopping Center?

A I do for that year.

Q For the year 1970-'71 will you kindly tell me what the assessment was?

A The assessment for Block 2440, Lot No. 2, was, land, $2,360,000; total, $6,550,000.

Q And do you have the assessment for the year 1972-1973?

A I do not have it as an official record. I have an interoffice record of it.

Q May I have that?

A 1972-'73?

Q Yes.

MR. BERGEN: Objection. Can we have what he means by an office record?

THE COURT: What are you referring to?

Q What document are you referring to?

A I am referring to an office record that we keep. It is not an official record.

Q Is that document prepared in the course of your business?

A Yes, we use it in our business.

Q Is it your duty to make such records?

A Yes, we keep such records.

Q What is it?

A What is it?

Q Yes, the year 1972-1973, the total assessment.

A The total assessment was $6,916,500.

MR. BUTLER: I have no further questions, your Honor.

THE COURT: Do you have the square foot assessment in either of those years?

THE WITNESS: I do not, your Honor.

MR. BUTLER: We will get that later, your Honor.

THE COURT: All right.

(Continued on next page.)

2 CROSS EXAMINATION

3 BY MR. BERGEN:

4 Q Mr. Vomero, was the assessment a matter

5 of public record at all times?

6 A Yes.

7 Q Was the tax rate a matter of public record

8 at all times -- public record?

9 A As far as I know, yes.

10 Q Was the assessment for the Staten Island

11 Mall a matter of public record at all times from the

12 time it was made?

13 A From the time it was made, yes.

14 MR. BERGEN: Thank you.

15 MR. BUTLER: I have no questions, your

16 Honor.

17 THE COURT: You are excused.

18 (Witness excused.)

19 MR. BUTLER: Your Honor, when we closed

20 yesterday Mr. John Feist was on the stand and you had

21 asked a question to provide further information regarding

22 utilities. Last night we called Marshall, Bratter

23 and requested that Mr. John Feist be here. Since there

24 was an open question, we were not completed. Mr.

25 Feist isn't here and we were told that they would not

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bring him here.

MR. BERGEN: Your Honor, yesterday we had direct examination, lengthy direct examination, cross examination, redirect, recross, and then Mr. Butler asked Mr. Feist some additional questions on redirect.

THE COURT: Mr. Bergen, get him here. I asked him a question and directed him to bring it back here this morning. Get him here or I am going to grant a judgment for failure to defend this case. Get him here. This isn't counsel. I asked the question.

MR. BERGEN: Your Honor, you asked us to provide the information. We did not understand that Mr. Feist was to supply it. We are trying to get the information today.

THE COURT: I may want to question him further about it. Get him here.

MR. BERGEN: I would also like to put on the record that Mr. Butler's partner, Mr. Keane, told us last night that they wanted Mr. Feist here so they could question him for another two hours. That's why he is not here.

THE COURT: This is a question by the court.

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I will brook no further arguments about it. Get him here, unless you want me to strike his entire testimony.

MR. BUTLER: The plaintiff calls as its next witness Mr. Donald Faughnan.

THE COURT: What kind of nonsense is this when the court orders a witness to be here.

MR. BERGEN: Your Honor, it is not nonsense. I did not understand Mr. Feist was to be back here. We had him on the stand all day yesterday.

THE COURT: Having read this utterly ridiculous statement of facts,utterly ridiculous detail, I don't wonder that you didn't understand.

Let's proceed. Get your next witness on.

MR. BERGEN: I don't understand what's ridiculous about the statement of facts. We sat down and we spent the whole weekend doing it.

THE COURT: It is utterly ridiculous. Proceed.

MR. BUTLER: Mr. Faughnan, please.

DONALD E. FAUGHNAN, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Faughnan, were you employed at the Staten Island Mall?

A I was employed by Feist & Feist.

Q When were you employed by Feist & Feist?

A I was employed from July, 1971 to February, 1974.

Q What was your position at Feist & Feist?

A I was the controller.

Q Would you briefly describe your duties?

A My primary responsibility was the maintenance of all accounting records and the submission of financial information to management.

Q That financial information would contain what?

A Reports on the operations and activities of the business.

Q Would you prepare estimates?

A I would, sir.

Q Now, were you involved in preparing --

THE COURT: You can lead this witness.

Q Were you involved in preparing any estimates in relationship to the construction and development and management and operation of Staten Island Mall?

A I did, sir.

Q Could you give me a brief synopsis --

THE COURT: I said you could lead the witness. It would save time.

Q Sir, are you a certified public accountant?

A Yes.

THE COURT: "You are a certified public accountant?" That's how you ask it in a leading way.

A Yes, I am.

Q Did you report your findings to Mr. John Feist?

A I did, sir.

Q What was Mr. John Feist's role?

A As vice president he was primarily responsible --

THE COURT: I said you could lead the witness.

Q Was Mr. John Feist primarily responsible for the operation and maintenance of the mall?

A Yes.

Q Was Mr. John Feist primarily responsible for receiving financial information relative to the estimated cost of operating and maintaining the mall when it came into existence?

A He did receive some -- the information was given both to John Feist and Irving Feist.

Q I show you Plaintiff's Exhibit 18 and ask you if this is a document which was prepared by you.

A It was.

MR. BUTLER: I submit Plaintiff's Exhibit 18 to Mr. Bergen to be introduced into evidence.

MR. BERGER: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 18 was received in evidence.)

xx Q I also show you Plaintiff's Exhibit No. 9, and I would like you, if you would be so kind, to look at both Exhibits 18 and 9.

Did you also prepare Exhibit No. 9?

A Yes, I did.

THE COURT: Why does 18 have any significance to me?

MR. BUTLER: Your Honor --

THE COURT: This isn't a city dump here where you just dump things. You are trying to educate me on what the facts are and that calls for some kind of communication.

MR. BUTLER: Mr. Faughnan has to see 9 and 18 together. That's why I gave him both of them.

Q Mr. Faughnan, I would like you to look at Plaintiff's Exhibits 18 and 9,and from Plaintiff's Exhibits 18 and 9 can you ascertain the per-square-foot charge of your estimate of common-area expenses?

A No. 9 identifies it as $5.33 for taxes, utility charges and common area.

THE COURT: As of what date?

THE WITNESS: That was August 2, 1972.

THE COURT: How much?

THE WITNESS: $5.33 per square foot.

THE COURT: 5.33.

Q And the common area charges as of August 14, 1972 --

A The common area charges are not broken out in those numbers, nor do I believe they are contained in this memorandum. You cannot compute the elements that go into that figure there from this exhibit 9.

Q I am talking about Exhibit 18. With re-

gard to Exhibit 18, the common area charges for a square foot as of August 14, 1972 were estimated at what figure?

A This document does not contain the computation. It does give the actual amounts of tax, rent, utility charges and common area charges.

THE COURT: Can you give us the answer? How much?

Q Isn't it $2.26 for the common area charge per square foot?

A It's a figure over $2 there. It's approximately 512,000 square feet into $1.161 million.

Q And we did that yesterday and it comes out to 2.26.

A It comes out to 2-something, right.

Q Did you tell Mr. Feist, in your conversations with Mr. Feist, that the common-area charge was approximately $2 or over $2.20 a square foot.

A That information would have been communicated to him, especially after the August 2nd meeting.

Q So you did inform Mr. Feist that the common-area charges, the estimate of common-area charge, was over $2 a square foot?

A I would have, yes.

THE COURT: When did you tell him?

THE WITNESS: Well, as a result of memorandums such as this it would have certainly been a point of discussion. This August 2nd memorandum would have been discussed with Mr. Feist.

THE COURT: Do you have any distinct recollection of telling him?

THE WITNESS: I could not say exactly what date we discussed it or the details of the conversation, but, you know, it would have been something we normally would have discussed.

THE COURT: In the regular course of business you discussed these figures?

THE WITNESS: During the regular course of business I would say we discussed it.

THE COURT: That's the practice in the company?

THE WITNESS: Yes, sir.

MR. BUTLER: Your Honor, the witness is referring to Plaintiff's Exhibit 9 where he says, in the last statement, "I think we should also ask ourselves whether it is economically feasible for our tenants to carry such high costs."

Q Now, with regard to the taxes from the docu-

ment Plaintiff's Exhibit 18, isn't the estimate of tax charges $1.90 per square foot as the tenants' share?

A That is correct.

Q And didn't you tell that to Mr. Feist, John Feist?

A It would have been communicated to him in the normal course of business.

Q You did prepare information such as this from August right on through the opening of the mall, isn't that correct?

A I did, sir.

Q And you continuously informed Mr. Feist of that information, isn't that correct?

A I would have.

MR. BUTLER: I have no further questions of Mr. Faughnan.

CROSS EXAMINATION

BY MR. BERGEN:

Q Mr. Faughnan, when you say you told John Feist this, did you tell him the exact figure of 2.26 and $1.90, or did you just send him those memos or copies of them?

A This memo here, Exhibit 9, would have been sent to him and, you know, there would have been

discussions on it. I am sure there would have been memorandums which maybe would have detailed it.

Q I asked you a specific question. Did you actually tell him that it was 2.26 for common-area charges and $1.90 for the taxes, or did you just send him these memos?

A No, I would have told him that the charges were in that area or wherever. You know, at the particular time I was giving a report to him I would have indicated what the amounts would have been.

Q Do you recall ever telling him that, either of those figures?

A Do I recall a specific date and time?

Q No.

A I cannot recall that.

Q No, I am not asking you whether you can recall a specific date and time. Do you have a recollection at this moment of ever telling John Feist either of those figures?

A I would have told him those figures in that amount, 1 in the approximate amount. Whether it was $2.26 or another figure around $2, he would have been advised.

Q Mr. Faughnan, I am asking you whether you

have a specific recollection right now of ever telling him those figures.

MR. BUTLER: I object to the question on the grounds it was asked and answered. The witness has testified that he cannot specifically say 2.26 --

THE COURT: You know, there is nothing wrong with my ears. I can hear the witness. I hear what he testified to. Now, if you have some objection in terms of a rule of evidence, what is it?

MR. BUTLER: Your Honor, the question has been asked and answered.

THE COURT: Sustained.

MR. BERGEN: No further questions.

MR. BUTLER: I have no questions.

THE COURT: You are excused.

(Witness excused.)

(Continued on next page.

2 MR. BUTLER: I call Mr. John Kelly to the
3 stand.
4 - -
5 J O H N K E L L Y , called as a witness by the plaintiff,
6 being first duly sworn, testifified as follows:
7 MR. BUTLER: Your Honor, it is stipulated that
8 Mr. Kelly is the vice-president of Magnavox that executed
9 the lease on behalf of Magnaleasing; that he negotiated
10 the lease with Mr. Kelly and Mr. Ungerleider, that he is
11 an attorney, graduated from law school in 1970 and has
12 been in private practice.
13 I have also stipulated that this was the
14 initial letter received by him which --
15 Do you stipulate to this letter? May I offer
16 it into evidence.
17 MR. BERGEN: May I see it?
18 THE COURT: I have the stipulations in evidence.
19 MR. BUTLER: The thing we do not have, your
20 Honor, is the full thing.
21 THE COURT: All right.
22 MR. BUTLER: I want to show it to the witness.
23 (Plaintiff's Exhibit 19 was received in
24 evidence.)
25 -

DIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Kelly, did you receive Plaintiff's Exhibit No. 19?

A Yes, I did.

Q And did you read the brochures which were attached to it?

A I read the brochures.

Q Now placing you, Mr. Kelly, at the meeting on December 4th with Mr. Kirtland, Daryl Laxson, yourself and Dale Kelly, will you tell me what you said to Mr. Kirtland and what Mr. Kirtland said to you?

A Well, when we first met --

THE COURT: When was that?

THE WITNESS: At the meeting at the Staten Island Mall on December 4th.

Q 1972?

A 1972. When we first met we engaged pretty much in a general discussion about Feist & Feist's experience in the real estate business and their experience in commercial real estate and managing and developing shopping centers.

Mr. Kirtland then discussed the studies that he had done on the mall, the population studies of Staten

Island and what the potential of the mall is -- he said he felt it to be a very, very promising undertaking and it should be the highest volume mall in the New York metropolitan area.

I then discussed with him the type of operation we were talking about, namely, a store of mid-size -- area of three to four thousand square feet which would be operated by a Magnavox dealer, to be subleased by us -- by Magnaleasing to a Magnavox dealer who would sell home entertainment products, TV products, stereo and so forth.

Mr. Kirtland then said that they were practically all leased and there were only two spaces leased in that particular size that I mentioned.

Q Did he show you any documents at that time?

A Yes, sir. He showed me a leasing plan, or two leasing plans, one for each mall.

Q I have here Plaintiff's Exhibits Nos. 20 and 21 which I show you, Mr. Kelly, and ask you if these were the plans that you had seen on that occasion (handing)?

A Yes, sir.

THE COURT: Are those floor plans?

MR. BUTLER: Yes, your Honor (handing to Mr. Bergen).

MR. BERGEN: No objection.

THE COURT: May I see them, please?

(Handed to the Court.)

(Plaintiff's Exhibits 20 and 21 were marked in evidence.)

xx MR. BUTLER: Your Honor, may I pull that table out and put these exhibits on there?

THE COURT: You have some thumbtacks over there--you can put them on the board.

(Plaintiff's Exhibits 20 and 21 set up on the blackboard.)

BY MR. BUTLER:

Q Mr. Kelly, will you describe the conversation which was had with respect to the floor plan?

A I first told Mr. Kirtland that we wanted to be located near the Sears store because Sears sold the same kinds of goods we sold -- TV and such things, and we found that we got a lot of traffic for our product, being located close to the Sears store, particularly the hard line.

Mr. Kirtland said there are no spaces available on the Sears' end of the mall. He said the only space available is space 220 -- there is a possibility of a portion of 201 may become available. Everything else he said is leased or leases are out, the business terms have been agreed upon, the leases are out for signature.

Then we went over some of the stores which were in the area we were talking about, some of the other tenants and I wrote down a number of --

THE COURT: Did he tell you how many leases were out for signature?

THE WITNESS: No, sir, he did not.

THE COURT: Did you ask him how many leases were out for signature?

THE WITNESS: No, sir, I did not.

THE COURT: Did he state in any terms or substance what percentage of the mall was leased?

THE WITNESS: Not that I can recall.

THE COURT: Did you ask him what percentage of the mall was leased?

THE WITNESS: He said it was all basically leased with the exception of a few spaces -- the leasing plan itself indicated the number of spaces which are leased, and those spaces where the leases are out.

THE COURT: It doesn't indicate that to me; perhaps you can explain it.

THE WITNESS: In each of the different locations there is a name, there is a dot -- a large dot indicates the leases signed; a small dot indicates the lease was out.

In addition, he indicated to me and I wrote down on the lease -- on the leasing plans in the area where we were talking about our store a number of other tenants which he said had signed subsequent to the time the leasing plan was drawn up, which would have been -- the last one was October 18, 1972.

Q So that the handwriting on the left-hand side -- the upper left-hand side indicating tenants is your handwriting?

A Yes, it is.

Q And you put that on there from what Mr. Kirtland had told you?

A That is correct.

THE COURT: Do the floor plans, Exhibits 20 and 21, show the Sears store?

THE WITNESS: Yes, it does, sir (indicating).

THE COURT: To the right on the chart.

THE WITNESS: Yes -- and the Macy's store is over here (indicating).

THE COURT: Macy's on the left.

THE WITNESS: Yes.

THE COURT: All right.

2 Q After you discussed a possible location, the square feet that you wanted, what else did you get into?

A We then got into the economics of the deal. We discussed the various financial aspects --

Q Will you tell the Court what he said and what you said?

A Mr. Kirtland said they are asking a rent of $10 a square foot for the store. He said that there would be -- they had estimated common area maintenance charges on a pro rata basis at 60 cents a square foot.

I asked him on what he had based these charges and did he feel they were accurate.

He said they based these charges on experience -- experiences in managing other malls in the New York metropolitan area, and he named several of those malls.

He then said real estate taxes -- he estimated real estate taxes at $1.25 per square foot, again on a pro rata basis, and then I asked him again "Well, what did you base that on?"

And he said, "Well, again it is based on our experience in the area."

I said, "Well, can that estimate vary?"

He says, "It could vary by as much as 25 cents one way or the other."

I says, "Is that based on the mall as completed, fully assessed as completed?"

And he says, "Yes, it is."

We then discussed the Merchants' Association charge, and he indicated that would be 20 cents a square foot -- again on a pro rata basis.

He indicated -- he said that there were a number of -- there were four mall advertising mailers which we would be required to participate in. He said that the landlord was offering a $4 a square foot construction allowance, and that the landlord provided basically --

Q Did you discuss with Mr. Kirtland the intended use of the facility?

A Yes, I told him that --

THE COURT: That is repetitive. He said he intended a sublease for a Magnavox dealer.

Q Did you discuss with Mr. Kirtland who was going to take the lease?

A I told him was a Magnavox dealer.

Q No. Did you tell him who was going to sign the lease?

A Yes, I said it would be a subsidiary of Magnovox.

Q Okay.

THE COURT: Did you name the subsidiary?

THE WITNESS: Not at that time, sir.

Q And when did you tell him the name of the subsidiary?

THE COURT: You had not yet identified the lessor?

THE WITNESS: No, he had not identified the lessor.

THE COURT: You hadn't -- the lessee, I mean.

THE WITNESS: That is correct.

Q At the end of the meeting there was no agreement?

A No, at the end of the meeting I told him that based on the --

Q Let us see if we can do it this way -- it would be easier if you would answer the question.

At the end of the meeting had you reached a conclusion?

A Yes, I reached a conclusion.

Q And what wasthat?

A We couldn't afford it, we couldn't do enough business to make it practical.

THE COURT: Did you tell him that?

Q Did you tell him that?

A Yes, I did, sir.

MR. BUTLER: It is stipulated, your Honor, that

after that meeting Mr. Kelly and Mr. Kirtland conferred again, and an offer was made of $7.50; that Mr. Kelly had refused that offer of $7.50. That was on or about December 13.

Thereafter it is stipulated also that Mr. Kirtland and Mr. Dale Kelly had come to an agreement on the $6.50 figure which was then communicated to Mr. John Kelly thereafter.

May I --

MR. BERGEN: Your Honor, I object to Mr. Butler's characterization that they "conferred". There was no further meeting, I believe, between Mr. Dale Kelly, John Kelly and Mr. Kirtland.

Q Tell us about the telephone conversation?

THE COURT: Please be accurate.

MR. BUTLER: I am sorry, I apologize.

May I just go back one second?

THE COURT: Yes.

BY MR. BUTLER:

Q At the meeting did you make any notes?

A Yes, I did.

Q I show you Plaintiff's Exhibit No. 22 and ask you to look at that document -- there are three pages to it -- (handing).

A (After examining) Two pages.

Q Two pages. Are those your notes?

A Yes. The second page --

Q Just answer the question.

Are those your notes?

A Yes.

Q And were these notes prepared at the meeting?

A The second page was prepared at the meeting. The first page was prepared shortly thereafter, within the next 24 hours.

Q Within the next 24 hours?

A Yes.

MR. BUTLER: I show to Mr. Bergen Plaintiff's Exhibit 22, which is being offered into evidence (handing).

MR. BERGEN: I would like to know who made the circles around the second page.

MR. BUTLER: I did, for his Honor's benefit.

MR. BERGEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 22 was received in evidence.)

xx THE COURT: Does it say anything about what the witness testified?

MR. BUTLER: No, your Honor. I just circled

it for you, that's it -- no testimony onit.

Your Honor, this letter is in part stipulated to. The letter itself is dated January 15, stipulatio- No. 46. I show it to the Court and introduce it into evidence. It has been agreed to.

MR. BERGEN: May I just see it, please?

MR. BUTLER: Surely (handing).

MR. BERGEN: Can we have who circled the guarantee?

MR. BUTLER: I did.

MR. BERGEN: No objection.

(Plaintiff's Exhibit 23 was received in evidence.)

xx MR. BUTLER: The only purpose of that is just to draw the Court's attention to the fact that they were sending a lease out to Magnavox but Magnavox was going to guarantee that a subsidary was going to enter into it.

It is further stipulated that Mr. Kirtland sent two copies of the proposed lease -- that is stipulation No. 47 -- and that Mr. Kelly received it; he proposed comments, 15 pages of comments -- that is stipulation No. 48; that he met with their attorney, Mr. Ungerleider, and by phone and otherwise -- that is stipulation No. 48 -- and then they came up with the lease. The lease was signed on April 26th by the plaintiff --

MR. BERGEN: Mr. Butler, I don't think there was an agreement as to the lease comments. Would you just be a little accurate, please. I object to their stating there was a lease comment.

THE COURT: I have a written stipulation. If I had a lifetime I could read it.

MR. BUTLER: Now, it is stipulated, stipulation 53, which I would like to quote:

"Kelly did not ask Kirtland or Ungerleider to insert into the lease --

THE COURT: Just direct my attention to stipulation 53. What's the sense of doing all of this? It's almost meaningless. I grant you it boggles the mind to try to read it, with all the senseless detail in this thing, sentence by sentence for endless pages. It is wholly useless to the court. So if you want me to read any of it, direct my attention to the paragraph.

MR. BUTLER: Your Honor, I was going go ask a question of the witness with regard to that statement, if I may.

THE COURT: Go ahead.

BY MR. BUTLER:

Q Stipulation No. 53:

"Kelly did not ask Kirtland nor Ungerleider to insert into the lease the figure $1 for tax rent and 60 cents for common-area charges."

Was there a reason for not asking them to put the dollar of tax rent and 60 cents of common-area charges into the lease?

A Yes. Well, the 60-cent estimate for common-area charges was already in the lease. The additional estimate was 60 cents. As far as the taxes were concerned, the tax clause said that we would receive landlord's estimate of taxes prior to the commencement of the lease and I fully expected that that estimate would be as related by Mr. Kirtland.

Q The commencent date.

A Yes.

MR. BUTLER: Your Honor, I call your attention to stipulation 39 under the heading "Tax Rent."

THE COURT: I don't have a 39. Mine skips from 38 to 41.

MR. BUTLER: Then you can take mine. I have no comments in here other than for that.

I will just draw the court's attention that the commencement date of the lease was to be the

opening of the mall, which is in the lease, and that the lease itself provided that, and it states here the landlord was going to provide an estimate to the tenant.

If I may, it is stipulated -- just going down through the stipulations and I will have a few questions of the witness as we go through.

On August the Staten Island Mall had sent out the tax bill.

MR. BERGEN: That isn't the complete document, Mr. Butler. I object to its introduction.

BY MR. BUTLER:

Q I show you Plaintiff's Exhibit 24. Was that document received by Magnaleasing, Inc.?

A Yes.

MR. BUTLER: Your Honor, the document is actually stipulated to. It's a document from --

MR. BERGER: The document was not stipulated to. It's not the complete document that was produced to us by Magnaleasing. I have the complete document right here. It was marked as an exhibit at Mr. Kelly's deposition.

THE COURT: You know, if you want to establish that there is a way to do it, Mr. Bergen.

You ask to examine the witness on a voir dire.

Did you get any other documents along with this letter?

THE WITNESS: I don't recall.

MR. BUTLER: Your Honor, that's the document which came. The document he is referring to, if I may --

THE COURT: Please. The witness says he doesn't recall. Do you want to take the stand?

MR. BUTLER: No, your Honor.

THE COURT: What is this? What is this? Moot court?

MR. BUTLER: I call the court's attention, if I may, to the figure on the second page, which is the figure of 250,000.

THE COURT: It's not in evidence. If you want me to read it, get it in evidence.

Q I show you Plaintiff's Exhibit No. 24 and ask you to take a look at that document. Did you receive that document?

A Yes.

Q Did you read that document?

A Yes.

Q That document was from whom?

A It's from Staten Island Mall, Feist & Feist.

Q And addressed to?

A To Magnaleasing, Inc.

MR. BERGEN: May I ask some questions, your Honor, on voir dire?

THE COURT: Yes.

VOUR DIRE EXAMINATION

BY MR. BERGEN:

Q Mr. Kelly, do you know after you received this document there were soem other additional documents by Magnaleasing attached to it?

A There may have been, yes.

Q What happened to those documents?

A I don't know.

Q I know that on the top there are a number of perforations where the other documents were removed from Plaintiff's Exhibit 24.

A Yes.

MR. BERGER: I object to its introduction.

DIRECT EXAMINATION CONTINUED

BY MR. BUTLER:

Q Do you know whether or not there were any other documents on this?

A When I received it?

Q Yes.

A No.

Q This was all you received, isn't that correct?

A Yes. So far as I can recall.

Q This is the only document which you received from Staten Island Mall?

A As far as I can recall, that's all.

Q The tax letter addressed to you and the tax bill, right?

A Yes.

MR. BUTLER: I offer it in evidence, your Honor.

MR. BERGER: I still object to it.

THE COURT: It is incomplete.

MR. BUTLER: Your Honor, there is no evidence that there were any other documents.

THE COURT: He says he doesn't recall. Your leading questions show --

MR. BUTLER: Your Honor, it is addressed to --

THE COURT: I don't care who it is addressed to. It's an incomplete document.

Q Does this letter make reference to any other

document than --

THE COURT: Sustained. It speaks for itself.

MR. BUTLER: How can it be incomplete, your Honor? It says from Mr. Faughnan to Magnaleasing.

THE COURT: Mr. Bergen established that the witness didn't know whether there were any other documents attached. He also established that there were perforation holes up in the corner, indicating it was stapled to something.

MR. BUTLER: Your Honor, we are using copies.

THE COURT: Objection sustained. Proceed.

Do you have the completed document, Mr. Bergen? We are not playing games here.

MR. BERGEN: I am not trying to play games, your Honor. I have a Xerox copy that was produced to us by Magnaleasing that consists of a number of pages.

THE COURT: Show it to counsel.

MR. BERGEN: It was Defendant's Exhibit 19 on Mr. Kelly's deposition.

MR. BUTLER: Your Honor, I call to your attention that all of these documents which are attached to this thing came after. This here document is dated August 31st and put on there by Magnavox.

THE COURT: Look, I wasn't there and you weren't either. You have to establish things through witnesses who have knowledge of them.

MR. BUTLER: May I offer this in evidence, your Honor, as Plaintiff's Exhibit No. 24.

I resent, your Honor, an attorney having an original document in his possession -- having the document in his possession and knowing that those documents which were added came after. It's not fair.

THE COURT: Proceed. I don't want any more speeches. I would like to see somebody try this case like a lawyer or hire one to do it for you.

MR. BUTLER: I offer Plaintiff's Exhibit No. 24 in evidence.

MR. BERGEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 24 were received in evidence.)

xx MR. BUTLER: The tax bill came in and

thereafter, as indicated in stipulation 90, Mr. Kelly wrote to Mr. Faughnan and I would like to introduce a copy of this letter as Plaintiff's Exhibit No. 25.

MR. BERGEN: Is the circle yours, Mr. Butler?

MR. BUTLER: Yes, it is.

MR. BERGEN: No objection.

(Plaintiff's Exhibit 25 was received in evidence.)

THE COURT: Mr. Bergen, your representation to the court that this was not an incomplete document is just ridiculous. The first document is dated August 31st. The next document is August 6th. The next one is August 23rd and the next one is August 22nd.

Now, it is perfectly evident that they did not go out together.

MR. BERGEN: That is the document that was produced to us.

THE COURT: Go ahead.

MR. BUTLER: That letter was a letter of complaint about the taxes which you have there.

THE COURT: I have it.

MR. BUTLER: Mr. Faughnan replied to that

letter. Trying to cut everything short here, that reply is dated September 6, 1973 and that is stipulated to.

The next event occurs in April when Magnaleasing was informed, stipulation 39. Magnaleasing is informed on April 15, 1974 that the common-area charges now are 2.58. That's the first note it gets. After it receives that notice Mr. Kelly again writes to the Staten Island Mall, and I would like to introduce this document, Plaintiff's Exhibit No. 26.

MR. BERGEN: Are the circles yours?

MR. BUTLER: The circles are mine.

MR. BERGEN: No objection.

MR. BUTLER: This is Mr. Kelly's letter to the Staten Island Mall.

THE COURT: No one has objected to this, but what does this prove? They are all after the event. But the reason for going into this matter after the event is the defense of laches or waiver.

THE COURT: All right.

(Plaintiff's Exhibit 26 was received in evidence.)

MR. BUTLER: The next thing which occurred,

xx

Exhibit No. 27.

BY MR. BUTLER:

Q Did you receive Plaintiff's Exhibit No. 27,Mr. Kelly?

A Yes, I did.

Q This letter is addressed to you. Did you receive that and read it?

A Yes, I did.

Q Morris Gliklich of Regal-Magnavox, who are they?

A He was our subtenant.

MR. BERGEN: I object to it on the grounds of relevance. It refers to utility charges, and I believe Mr. Butler stated yesterday that he had dropped that.

MR. BUTLER: Your Honor, the document also refers to, if I may quote:

"The following is the address of the Staten Island attorneys engaged by tenants."

THE COURT: The document isn't in evidence.

What's your objection?

MR. BERGEN: I object that it is a document that seems to relate to utility charges and

Mr. Butler said yesterday that they were dropping that allegation.

MR. BUTLER: Your Honor, we are not talking about the utilities here; we are talking about --

THE COURT: Let me see it.

MR. BUTLER: As you will see, the second and third paragraphs have to do with retaining counsel to defend the position at the mall.

THE COURT: Overruled.

MR. BERGEN: Your Honor, this letter merely refers to attorneys who have been hired by the tenants. It doesn't say anything about that they were hired by Magnaleasing.

THE COURT: I will take it for what it is worth.

(Plaintiff's Exhibit 27 was received in evidence.)

xx MR. BUTLER: I would like to introduce just one more document. It is Plaintiff's Exhibit 29. I believe there is a stipulation on it. It's the letter of Mr. John Feist in reply of Mr. Kelly's letter, which was the letter of April 30th, which was the complaint. I would refer to stipulation 99 and I will put it in the record to make the record complete

on that.

MR. BERGEN: No objection.

(Plaintiff's Exhibit 28 was received in evidence.)

xx BY MR. BUTLER:

Q That brings us, Mr. Kelly, up to June 20, 1974. Would you be kind enough to tell me what happened after that?

A After June 20th?

Q Yes.

A Yes. Mr. Feist had written us telling us --

Q Did you stop paying the bills for common area and taxes?

A We stopped paying the additional charges that were over and above the estimates given to us.

Q Were you sued?

A Yes.

Q From the commencement of the lease on August 8, 1972, at what rate have you been paying common area-charges?

A The initial billing was at 2.45. That was adjusted again. I think it works out to $2.57.

Q For taxes. For the first year of taxes,

and the tax year, of course, is July 1st to June 30th, the first tax year being July 1, 1973 to June 30, 1974. During that period what tax did you pay?

A Okay. We didn't open -- it didn't begin until August 9th, but on a prorated basis --

Q Per square foot.

A Right. It would work out to $2.64. That's what's actually paid.

Q Was the mall fully assessed at that time?

A No. It was not fully assessed until the following year.

Q The building wasn't assessed, right?

A No.

Q For the next year.

A Right.

Q That is July 1, 1974 to June 30, 1975, what was the square-foot charge for taxes?

A It was $5.80.

MR. BUTLER: I have no further questions.

CROSS EXAMINATION

BY MR. BERGEN:

Q Mr. Kelly, for what purpose was Magnaleasing formed?

A It was formed for the purpose of leasing stores to be used -- to be subleased to our dealers.

Q Now, referring you to Plaintiff's Exhibit 22, Mr. Kelly, which are your notes about the December 4th meeting, I direct your attention to next to the "60 cents." What does the "Est" stand for?

A Estimate.

Q It says, "All over 25 cents/SF." I guess that's square foot?

A That's correct.

Q Then in parentheses,"(1 dollar Est.)"?

A Correct.

Q What does the "Est." stand for there?

A Estimate.

Q You understood, according to your testimony, that when Mr. Kirtland gave you these figures, that these were estimates?

A Yes.

Q What did you understand by the "All over 25 cents/SF"?

A Yes. He had told me that the total tax bill would be -- they estimated it at $1.25 and that the landlord would take 25 cents off that, that their obligation was limited to 25 cents and anything

in addition we would pay.

Q Didn't Mr. Kirtland really tell you that if you leased the store, if your company leased the store, that your company would be liable for anything with respect to taxes all over 25 cents?

A No. He told me the taxes -- they had estimated taxes at $1.25 a square foot.

(Continued on next page.)

2 Q Isn't that what the "all over" the 25 cents
3 means (indicating)?
4 A Yes.
5 Q Now going back to the January 15th letter --
6 showing you the January 15, 1973 letter from Mr. Kirtland
7 to you, Mr. Kelly, Plaintiff's Exhibit 23, what was your
8 understanding of that letter (handing)?
9 A (After examining) I don't understand the
10 question.
11 Could you rephrase it, please?
12 Q Well, was this an offer from Staten Island Mall
13 to Magnavox with respect to the leasing of the store?
14 A Yes.
15 Q What was your understanding of the language
16 down toward the bottom of the first page:
17 "CAM: Tenant will pay his propotionate
18 share. Will be billed $.60 per square foot."
19 A That the common area charges will be billed at
20 60 cents a square foot.
21 Q And how long was that 60-cent estimate going to
22 be good for?
23 MR. BUTLER: Your Honor, I object to that ques-
24 tion on the ground that Mr. Bergen's statement and the
25 letter are at odds. The statement says, "Will be billed

at $.60 per square foot", and Mr. Bergen says, "How long is that estimate going to be good for."

MR. BERGEN: I am asking him what his understanding is.

THE COURT: Reframe your question.

Q What was your understanding as to how long that 60 cents would apply?

A Well, it would be the initial estimate, you know, which would carry on for some reasonable period, and we understood this would increase as the cost of doing business increased.

Q Did Mr. Kirtland ever tell you or give you any particular period of time in which that 60-cent figure would apply to?

A No.

Q I just want to be clear on this, did you have some understanding as to what period of time it would apply to?

A The 60 cents?

Q Yes.

A No. no particular period.

Q Did you expect that this provision -- again I am talking about the language, referred to in the January 15th letter to the 60 cents per square foot -- did you expect

that this provision would be incorporated into a written agreement --

A Yes.

Q -- between you and Magnavox?

A Yes.

Q And was that later done?

A Yes.

Q And did you, since you assumed that the provision was going to be incorporated in the written lease, and it was incorporated in the written lease, did you expect to pay according to the provision in the lease?

A Yes.

Q Now referring to the second page of the January 15th letter, and I quote:

"Real Estate Taxes: Landlord will pay first $.25 per square foot. Tenant will pay his proportionate share all over."

Can you tell me what you understood those two sentences to mean?

A That those real estate taxes, the ~~tenant~~ landlord will pay the first 25 cents per square foot and we would pay our proportionate share over and above that.

Q Does it say anything in that letter about one dollar a square foot?

A No.

Q Did you ever ask Mr. Kirtland, after you got that letter, what happened to the dollar a square foot figure?

A No.

Q Did you ask him why the dollar per square foot figure that you say he gave you with respect to taxes, his estimated taxes, wasn't in the letter?

A No.

Q And did you expect the tax figures -- and again I am referring to the provision in the January 15th letter, referring to real estate taxes -- did you expect that there would be a provision in the lease convering taxes?

A Yes.

Q And did you expect that you would pay taxes according to what the lease said?

A Yes.

Q And in fact, didn't you plan to pay additional rent, specifically taxes and common area charges in accordance with the written provisions of the lease?

A Yes.

Q And you had that expectation at the time you signed the lease?

A Yes.

Q Do you know who Thomas Hafner is?

A Yes, I do.

Q Who is Mr. Hafner?

A Mr. Hafner is employed by Magnavox.

Q Is he an attorney with Magnavox?

A Yes, he is.

Q Is he also the Assistant Secretary of Magnaleasing?

A I believe so, yes.

Q Was he also the attorney who was responsible for Magnaleasing and its affairs, reviewing its affairs within Magnavox?

A That was a small part of the duties, yes.

Q But I mean that was one of the things that he was responsible for?

A In that area, in that group.

Q And it has been stipulated that Mr. Hafner never read the lease before it was signed in this case?

A He never read the final lease either.

Q Well, he never even read the draft of the lease?

MR. BUTLER: Your Honor, I object on the ground that it is stipulated to, that Mr. Hafner did not read the lease.

Q Did you send the lease to Mr. Hafner and ask him to read it?

MR. BUTLER: Your Honor, that is stipulated to -- he did not read it.

MR. BERGEN: I do not understand your objection.

MR. BUTLER: We have a stipulation, your Honor, if I may refer the Court to it, which is No. 51:

"Kelly sent Hafner copies of the proposed lease, which incorporated the lease changes, and of Kelly's Lease Comments; Hafner did not review the lease prior to its execution."

MR. BERGEN: Your Honor, I asked the witness whether he asked Mr. Hafner to read the lease.

THE COURT: Did you ask him?

THE WITNESS: I don't recall.

Q Wasn't it his responsibility to read the lease, to review it?

A I don't know. I was not his superior.

Q Was the lease ever shown to any attorney outside of Magnavox prior its signing?

A No, we didn't.

Q I do not understand what you mean by "No, we didn't."

A Magnaleasing didn't.

Q Magnaleasing did not send it to any outside attorney?

A That is right.

Q Now between December 4, 1972 and the signing of the lease did you and Mr. Kirtland ever again discuss the dollar figure and the 60-cent figure?

A In our conversation -- I think it was on December 14 -- when he made the $7.50 offer I said that the total cost -- the cost of the rent and the other charges that he related to me were simply too high, based on the volume of business we could expect out of it. I did not specifically mention those items that were included in the additional charges.

Q The two of you never discussed it?

A We never discussed those two items specifically.

Q Mr. Kelly, you on behalf of Magnaleasing and Magnavox did not make any independent investigation concerning these alleged estimates that Mr. Kirtland gave you as to the tax rent that Magnaleasing could expect to pay under it?

MR. BUTLER: Your Honor, it is stipulated to. What he is doing is reading the stipulation.

MR. BERGEN: No, I am not. I am reading from our contentions.

A No, we thought the taxes were very high at the beginning --

THE COURT: I am sorry, I did not hear you.

THE WITNESS: We thought the taxes were extremely high, to begin with.

Q No, I am talking about before signing the lease --

A No.

Q -- did you make any investigation?

A No, we did not.

Q Wasn't the reason that you did not ask either Mr. Kirtland or Mr. Ungerleider from Marshall Bratter to insert into the lease the alleged estimates concerning common area charges and taxes was because you believed the mall would never agree to such an inclusion?

A I believed Mr. Kirtland's estimate, and I recognized a small tenant in a large regional mall shopping center isn't going to be successful in placing exact limits on taxes or common area maintenance charges.

Q So you did not ask him to insert it?

A No, I did not.

Q Because you knew they wouldn't accept it?

MR. BUTLER: Objection, your Honor. That is not what he said. He is talking about limits.

THE COURT: That is the next question. I assume this lawyer understands English.

Answer the question.

THE WITNESS: Will you repeat the question?

MR. BERGEN: Will you read the question, please?

(Question read by the reporter.)

A Yes.

Q And you mentioned before that you also believed Mr. Kirtland's representations. If you believed Mr. Kirtland's representations about this why did you bother to even have a written lease?

MR. BUTLER: Your Honor, I object to that. The question is argumentative.

THE COURT: Obviously.

Q Did you yourself, Mr. Kelly, review each one of the paragraphs in the lease? Did you review the lease completely?

A Yes, I did.

Q And did you ever tell Mr. Kirtland that this was the longest, most restrictive lease you ever read, that you ever reviewed?

A I think I used the word "tortuous", too.

Q Mr. Kelly, I show you a document that has been

marked as Defendant's Exhibit K for identification (handing), and ask you if you have ever seen that?

A Yes.

Q Is that a copy of a letter that you sent to Mr. Kirtland?

A Yes, it is.

MR. BERGEN: I offer Exhibit K in evidence.

MR. BUTLER: I have no objection to it, your Honor.

THE COURT: Received.

(Defendant's Exhibit K was received in evidence.)

xx BY MR. BERGEN:

Q Mr. Kelly, I show you a document that has been marked as Defendant's Exhibit L for identification (handing), and ask you if you can identify that for the record, please?

A (After examiing) Yes, these are lease comments I sent to Mr. Kirtland.

Q The top page is your letter dated February 27 to Mr. Kirtland?

A Yes, that is correct.

Q And the remaining pages are your lease comments with respect to the Staten Island Mall lease?

A That is correct.

MR. BERGEN: I offer Defendant's Exhibit L (handing).

MR. BUTLER: Objection, your Honor.

(Mr. Bergen hands to the Court.)

THE COURT: I am not going to read through the comments.

Is there anything here that you want to direct my attention to?

MR. BERGEN: I am just going to ask him a question about it, your Honor.

THE COURT: I am more interested in the quality of the evidence than in the quantity.

BY MR. BERGEN:

Q Mr. Kelly, did any of your lease comments refer to the fact that the one-dollar estimate that you claim Mr. Kirtland gave you with respect to taxes did not appear in the draft of the lease?

A No.

Q Now the August 23rd letter, which is Plaintiff's Exhibit 25, you sent to Mr. Faughnan. Did you ever get an answer to that letter from Mr. Faughnan?

A Yes.

Q I show you a portion of Defendant's Exhibit O

for identification, which is the last two pages, and ask you if that is a copy of the letter that you got from Mr. Faughnan (indicating)?

A Yes.

Q Can you identify the first four pages of Defendant's Exhibit O for identification? Are they Magna-leasing documents?

A It is a request for check.

Q The second page a bill?

A The second page is a bill from Feist & Feist.

The third page is another bill from Feist & Feist.

The fourth page is a routing slip from H.E. Grenesco to myself, and the final two pages are the original documents.

MR. BERGEN: I offer Defendant's Exhibit O.

MR. BUTLER: It is in evidence.

MR. BERGEN: No.

MR BUTLER: I have no objection, your Honor.

MR. BERGEN: I offer it in evidence, your Honor.

(Defendant's Exhibit O was received in evidence.)

xx THE COURT: What is its ultimate value?

MR. BERGEN: Your Honor, the letter from Mr. Faughnan answers Mr. Kelly's memo, and I will elicit from Mr. Kelly that after he received that letter they paid the rent bill.

THE COURT: Where is the letter?

MR. BERGEN: The last two pages.

THE COURT: Is all this junk necessary?

MR. BERGEN: Yes, your Honor, it is.

(Continued on next page.)

2 Q Mr. Kelly, did you ever respond to Mr.
3 Faughnan's letter of September 6, 1973?
4 A No.
5 Q After the receipt of Mr. Faughnan's letter
6 Magnaleasing paid the August tax bill, isn't that
7 correct?
8 A Yes.
9 Q I direct your attention to the third page,
10 which is your routing slip to Mr. Grenesco. Is that
11 your handwriting where it says, "If this is okay, you
12 may pay tax rent. I see no way out"?
13 A Yes.
14 Q With respect to the last paragraph of Mr.
15 Faughnan's letter, and I show you Plaintiff's Exhibit
16 25 -- I'm sorry; Defendants' Exhibit O -- can you
17 explain what you understood Mr. Faughnan to mean in
18 the last sentence of paragraph 3 where he said:
19 "Also, you must realize that since the
20 proration of taxes is based on leased space, any com-
21 parison of an estimate with actual expenses is
22 significantly affected by the level of occupancy"?
23 A Yes. Since our taxes were based on
24 those stores which are leased in the mall and only at
25 this time I think about 58 per cent were leased, we

were paying a higher proportion of taxes than had the entire mall been leased.

Q Were you also paying a higher proportion of taxes because the denominator of the formula for the calculation of tax rent in the lease read, "Leased or occupied space in the shopping center" instead of "leasable"?

MR. BUTLER: Objection, your Honor, as being totally immaterial. The lease says what it says.

MR. BERGEN: I think it is very material, your Honor, and I can explain why.

THE COURT: Overruled.

A Would you repeat it.

MR. BERGEN: Read back the question, please.

(Record read.)

A That's correct.

MR. BUTLER: Objection. Higher than what? I really don't understand the question. Higher than what? Higher than something else? Higher than what? It has no relation to anything. The question is totally meaningless.

THE COURT: Proceed.

A Yes.

MR. BERGEN: Can I get an answer to that question?

THE COURT: He did answer it. Proceed.

A That's correct.

Q So you understood that had the denominator in the tax formula been leasable your taxes would have been lower?

MR. BUTLER: Objection unless there is a time frame for that. I don't know what time he understood this, if he understood it at all.

Q Before you signed the lease.

A Could I have the question, please?

MR. BERGEN: Read the question back.

(Record read.)

A Yes, unless the mall were entirely leased.

Q And did you understand the formula for a calculation of both tax rent, which appears in section 4.5(B) of the lease and also the formula with respect to common-area charges, which appears in section 5.3(A)ii and 5.3(B) of the lease at the time you signed the lease?

A Yes.

Q Did you ever ask anybody connected with

the mall to modify either of those formulas to provide that the denominator would be leasable space as opposed to leased or occupied space?

A No.

THE COURT: Before you signed the lease did you know how much space had in fact been leased? Just before you signed this lease.

THE WITNESS: No. Only what I had been told by Mr. Kirtland.

THE COURT: A few moments ago you referred to a document and said at that time it was only 58 per cent leased. I think that had to do --

THE WITNESS: With taxes, but that was received after the lease was signed. That was received in August and the lease was signed in May.

Q Did you ever have any discussions with Mr. Hafner prior to April, 1974 about possibly commencing a suit to rescind the Staten Island Mall lease?

A April, 1974?

Q Prior to that.

A Yes, I believe we did.

Q When did you have those conversations?

A I can't recall. We had a number of conversations from the time we received the first

tax bill right on through to the time when the suit was started.

THE COURT: What was that date?

THE WITNESS: August of '73.

THE COURT: You discussed bringing an action for rescission at that time?

THE WITNESS: We discussed bringing an action for some kind of relief, yes.

THE COURT: On what grounds?

THE WITNESS: On the grounds of rescission or reformation.

THE COURT: But you have got to base a suit for rescission on some ground.

THE WITNESS: On misrepresentation, on fraud.

THE COURT: That's back in August of '73?

THE WITNESS: Yes.

THE COURT: When did you commence this suit?

THE WITNESS: I believe it was toward the end of '74.

MR. BERGEEN: It was filed December 19, 1974, your Honor.

Q What was the result of these conversations

between you and Mr. Hafner about commencing a suit for rescission?

A Well, of course, initially we felt before we were open and we only received the first tax increase, we felt that as an alternative to bringing an expensive suit,which we frankly had doubts as to whether or not we could prevail, we would go on with it as the problems became -- you know the financial -- as the costs escalated and escalated, well, we eventually did file suit.

Q In other words, what finally brought you to bringing the lawsuit was that the costs kept going up?

A Yes.

Q Anything else?

A Of course, the first thing we did was withhold payment. You know, that started in, I believe, June or July of '74.

Q But up until then you continued to pay the taxes and continued to pay the common-area maintenance charges as they were billed each month by Feist & Feist?

A Well, they were paid. Whether they were paid as billed or on time or not, I couldn't say.

Q But as a bill came in, sooner or later it

it was paid?

A Yes. As far as I know, Mr. Gliklich paid it.

Q Going back a little bit, Mr. Kelly, showing you Defendants' Exhibit D for identification, and I ask you if you can identify that document.

A Yes.

Q Can you tell the court what that is?

A Yes. This is a record of shopping center negotiations prepared January 4, 1973.

Q Is this your typewritten version of the record of the negotiations that took place on December 4, 1972?

A Yes. I think in addition we would include information I got from Dale Kelly or George Kirtland thereafter.

MR. BERGEN: I offer Defendants' Exhibit D into evidence.

MR. BUTLER: Okay. No objection, your Honor.

THE COURT: What's the source of this document?

MR. BERGEN: This was produced by the plaintiffs, your Honor.

THE COURT: Did you receive this, Mr. Kelly, at or about the time?

THE WITNESS: I prepared it, sir.

MR. BERGER: I think he made it.

THE WITNESS: Yes, sir.

(Defendants' Exhibit D was received in evidence.)

xx Q Now, Mr. Kelly, going back to your conversations with Mr. Hafner, did you ever tell anybody in Magnavox or Magnaleasing that you and Mr. Hafner believed that Magnaleasing or Magnavox didn't have a strong enough case to recommend legal action with respect to this lease?

MR. BUTLER: Your Honor, I am going to object to this line of questioning as being totally immaterial and irrelevant. What their opinion is as to success in a fraud action is not for them to determine, nor for even myself to determ ine, but for a court to determine.

THE COURT: Overruled.

THE WITNESS: Would you read the question back, please.

THE COURT: Did you ever tell them they didn't have a very strong case for a fraud action?

THE WITNESS: We told them we felt it would be difficult to win. We thought fraud cases were always very difficult to win. We were concerned about the written lease and the oral representations.

THE COURT: When did you tell him that and whom did you tell?

THE WITNESS: Who did I tell? I told Mr. Michaelson.

Q Who is Mr. Michaelson?

A Mr. Michaelson is the vice president of the Consumer Electronics Group.

Q Of Magnavox?

A Yes. I told Mr. Grenesco.

Q And who is Mr. Grenesco?

A Mr. Grenesco was the Magnaleasing coordinator, financial analysis for Magnaleasing.

Q He is an employee of?

A Magnavox.

Q Is Mr. Michaelson your superior?

A No, sir.

THE COURT: When did you tell him?

THE WITNESS: In the summer -- in the late spring, early summer of 1974.

Q Mr. Kelly, I show you a document that has

been marked as Defendants' Exhibit F for identification, which is a copy of a memo, and I ask you if you would identify that, please.

A Yes. This is a letter to Mr. Michaelson.

Q It's a memo, isn't it?

A Yes. A memo to Mr. Michaelson from myself.

MR. BERGER: I offer Defendants' Exhibit F in evidence.

MR. BUTLER: I have no objection, your Honor..

(Defendants' Exhibit F was received in evidence.)

xx Q Mr. Kelly, I show you Defendants' Exhibit F and I ask you if that refreshes your recollection that you did tell Mr. Michaelson that you don't have a strong enough case to recommend legal action?

MR. BUTLER: Your Honor, the document speaks for itself as to that statement. I think he should quote it correctly. He says, "Our belief is at this time that we do not have strong enough"--

MR. BERGEN: It doesn't say --

THE COURT: I will sustain your first objection. I don't need the chatter.

MR. BUTLER: I'm sorry, your Honor.

Q Did you ever discuss this memo with Mr. Michaelson?

A May I see the memo again, please?

Q Yes.

A I don't recall.

Q Now --

THE COURT: You addressed it to him. Did you send it to him?

THE WITNESS: Yes, I sent it to him, that's correct.

Q Mr. Kelly --

THE COURT: Did he respond to it in any way?

THE WITNESS: Yes.

THE COURT: What did he say?

MR. BERGEN: I have that memo. I was just going to produce it, your Honor.

THE COURT: All right.

Q I show you Defendants' Exhibit G for identification and ask you to identify that, please.

A This is the response from Michaelson to my memo.

MR. BERGEN: I offer it in evidence.

MR. BUTLER: Fine, no objection.

(Defendants' Exhibit G was received in evidence.)

ss Q Do you recall getting Mr. Michaelson's memo?

A Yes.

Q Exhibit G.

Did you respond to Mr. Michaelson's memo?

A Yes, I did.

Q Did you talk to him, Mr. Michaelson, after you received his memo, Defendants' Exhibit G, or did you just write a memo back to him?

A I don't recall whether I talked to him, but I did respond with another memo.

Q I show you Defendants' Exhibit H for identification and ask you if you can identify that, please.

A Yes.

Q That's your memo to Mr. Michaelson in response to his memo, Defendants' Exhibit G?

A Yes.

MR. BERGER: I offer Defendants' Exhibit H in evidence, your Honor.

MR. BUTLER: I have no objection to that.

(Defendants' Exhibit H was received in evidence.)

xx

2 BY MR. BERGEN:

3 Q Mr. Kelly, do you recall when the decision was

4 finally made to commence this lawsuit?

5 A This particular lawsuit?

6 Q Yes.

7 A I think it was around September or October --

8 September 1974.

9 Q Isn't it a fact that it was November 20, 1974?

10 A Well, it was originally made in response to the

11 suit by the mall against us in Civil Court in Staten Island

12 for summary judgment -- for summary proceedings for these

13 additional charges that we weren't paying. We could not

14 bring this counterclaim there so we ultimaely had to bring

15 this suit.

16 Q You are talking about the summary dispossess

17 proceedings brought by the Mall --

18 A That is correct.

19 Q -- for failure to pay the common area charges

20 and taxes?

21 A Right, the portion over what had been repre-

22 sented to us.

23 Q And isn't it true that the frist real serious

24 discussion about bringing this lawsuit was after you were

25 sued by the Mall in the summary dispossess proceedings?

A That is not correct.

Q It is not correct?

A No.

THE COURT: Had Morris moved out before the suit?

THE WITNESS: No, sir.

THE COURT: Wasn't he making payments?

THE WITNESS: He was making some of them, yes.

THE COURT: But not all?

THE WITNESS: No, sir.

THE COURT: And that is why the landlord turned to you.

THE WITNESS: Yes.

Q Isn't it true that Morris just stopped paying after a while and Magnaleasing started to pay, or Magnavox, I should say?

A After the summary proceedings I believe was when we started paying the rent, yes.

Q Magnavox paid the rent?

A Magnaleasing paid the rent.

Q Magnaleasing doesn't have any bank account?

A Well, they have a separate set of books.

Q That wasn't my question.

Does Magnaleasing have a bank account?

A No.

Q So all the money comes from Magnavox and kind of goes through a set of books of Magnaleasing and then up to the Mall and up to anybody else?

A I don't really know.

Q You don't know?

A I don't know.

Q You are the vice-president of Magnaleasing, aren't you?

MR. BUTLER: He is arguing with the witness. I object to that on that ground.

MR. BERGEN: I am sorry, I withdraw the question, your Honor.

Q You are vice-president of Magnaleasing.

A Yes, I am

Q And yet you do not know how Magnaleasing's bills are paid.

MR. BUTLER: Objection, your Honor. He is arguing with the witness.

THE COURT: Sustained.

Q Mr. Kelly, with respect to your testimony just a minute ago about when you first seriously discussed commencing this action, I would like to read to you from page 107 of your deposition:

"Q I am talking specifically about filing

a lawsuit.

"A The first real serious discussion why we had felt this would be necessary -- the first real discussions, serious discussions were held shortly before it was filed. We were reluctant to file a lawsuit when we felt there were other ways -- there was a possibility of alleviating the situation if I could speak with the landlord and get some cooperation from the landlord."

Do you recall that testimony?

A Yes, in general I recall that.

Q So that the first serious discussion about filing the lawsuit was just prior to the commencement of the lawsuit?

A Well, we were using other means to solve the problem.

Q And the first serious discussion about filing a lawsuit was after you got sued by the Mall?

A We had a number of serious discussions about the problem. At one point when the suit was filed, when we were in court, then we seriously discussed what we were going to do about it then.

Q After the Mall suit.

A Yes.

Q Do you recall telling either Mr. Grenesco or Mr. Michaelson just prior to the commencement of the lawsuit that you thought Magnaleasing or Magnavox will lose the lawsuit?

A I think I may have said it would be a difficult lawsuit to win.

Q Well, I asked you whether you specifically -- whether you remember using the words "We will lose"?

A No, I do not.

Q Do you recall being at a meeting on December 5, 1974 with Mr. Grenesco and Mr. Michaelson with respect to the Staten Island Mall problem?

A I recall it, yes.

Q I show you a document that has been marked as Defendant's Exhibit E for identification, and i ask you if you have ever seen that document (handing)?

A Yes.

Q Can you identify it?

A Yes, I saw this at my deposition.

Q And is that a memo from Mr. Michaelson about a meeting on December 5th between you and Mr. Michaelson and Mr. Grenesco?

A I don't know. There is no name on it. I assume it is.

MR. BERGEN: I offer Defendant's Exhibit E in evidence (handing).

MR. BUTLER: Your Honor, I object to the introduction of Defendant's Exhibit E into evidence on the ground that there is no identification as to who prepared this memo.

THE COURT: Lay a foundation.

MR. BUTLER: May I ask the witness a question?

THE COURT: I am sustaining your objection.

MR. BUTLER: Thank you, your Honor.

BY MR. BERGEN:

Q Do you recall the meeting between Mr. Grenesco, you and Mr. Michaelson in December of 1974 about the Staten Island Mall?

A No, I do not recall the particular meeting.

Q Was the reason for your belief and Mr. Haftner's belief that you did not have a strong enough case to recommend legal action the fact that you had a written lease?

A That was part of it.

Q Well, isn't it a fact that that was the whole thing, the difficulty of overcoming the written terms of the lease?

A That was part of it.

Q And was another part of it the difficulty of

proving fraud?

A The difficulty of proving fraud in general, yes.

Q Do you know whether between the time of your memos in July of 1974 to Mr. Michaelson, and his memo to you, and then your response to his memo -- between that time and the time of the commencement of the lawsuit in December of 1974 whether any new facts came to light with respect to the Staten Island Mall matter?

A Could you define that a little bit more? What type of facts are you talking about? I don't really understand.

Q Would you just answer the question?

A You mean legal facts?

THE COURT: It is not capable of an answer. You are cross-examining. You may lead him.

Q Mr. Kelly, were there any new facts that came to light between the time of your July memos and the filing of a lawsuit which caused you to change your belief that you did not have a strong enough case to recommend legal action?

A Only from a financial point of view, that it was costing more money.

Q In other words, only that the expenses were

getting higher.

A Right.

Q At that point in time, in late 1973 or 1974 was there a reason--

A You're talking about 1974?

Q No, I am going to another subject.

A Oh, I am sorry.

Q Was there a reason between late 1973 and all through 1974 that expenses -- and I am talking about all expenses -- in the United States were getting higher?

A We had inflation, yes.

Q Isn't it a fact that the oil embargo was causing really a downturn in the economy and a subsequent rapid rise in inflation?

MR. BUTLER: I object, your Honor. This witness is not qualified to testify with regard to the economics of this country.

THE COURT: He was qualified to tell that to Mr. Michaelson in one of his memos.

MR. BUTLER: Your Honor, the memo you are referring to is just utilities and not the entire economy.

THE COURT: Perhaps the question was too broad.

MR. BERGEN: Your Honor, I think anybody who is

living in the United States --

THE COURT: I think I am probably in a better position to take judicial notice of the fact that inflation affected the economy.

Q Isn't it true, Mr. Kelly, that the number of leases that were negotiated by Magnaleasing during 1974 and into 1975 had decreased for economic reasons, particularly the oil crisis which caused a substantial reduction in sales?

A No, it would be 1975.

Q Didn't this substantial reduction in sales begin in the beginning of 1974?

A You're right -- it would be '74, yes.

Q And the reason for that was the economic reasons because the oil crisis caused a substantial reduction in sales?

A I don't know what caused it.

Q I read from page 14 of your deposition, beginning at line 7:

"Q Is there a reason that the number" -- and we are referring to the number of leases being negotiated -- "has decreased from 1974 to 1975?

"A Economical.

"Q Could you tell us what those economic

reasons are?

"A The TV business pretty much follows the automobile business. When the oil problem hit, we were hit very seriously, too. There were substantial reductions in sales. There were substantial reductions in the amount of TV sets sold.

"Q Did you say something about thirty percent?

"A I think industry-wide, it was in the neighborhood of thirty percent.

"Q Could you tell us when this substantiawl reduction began?

"A The beginning of 1974. During seventy-four approximately."

Do you recall that testimony?

A Yes.

Q Now I would just like to read you a sentence frlm the lease, Mr. Kelly, which is Plaintiff's Exhibit 15. I am reading from Section 5.3-B, beginning at the bottom of page 13:

"For purposes of the period from the Commencement Date to the Date the Landlord furnishes the first statement to Tenant, Landlord's estimate of Tenant's Proportionate Share of Common Area Charges shall be

60¢ per annum per square foot of Floor Space in the Demised Premises."

Is there any way in which that sentence does not accurately reflect the representation that you say Mr. Kirtland made to you with respect to the 60-cent common area charge?

A Yes, it reflects that.

Q And it isn't at odds with that statement, Mr. Kelly.

A No.

Q Before you signed the lease did you understand the lease?

A Yes

Q And at the time you signed it you felt that you understood it.

A Yes.

THE COURT: How long had you been in the business negotiating leases for Magnavox?

THE WITNESS: For Magnaleasing? I started in August of 1972. The lease was signed in May of '73.

THE COURT: And prior to that had you had experience?

THE WITNESS: I was with Food Fair Stores for four -- four and a half years.

THE COURT: And is it a common term of the leases to have estimates of what the common area charges will be?

THE WITNESS: In the lease? No, not originally.

THE COURT: You say it is not a common practice?

THE WITNESS: No, sir. I mean to have estimates in the lease?

THE COURT: Yes.

THE WITNESS: Yes, if it is possible it is in the lease.

THE COURT: As to taxes?

THE WITNESS: Yes.

THE COURT: And as to common area charges?

THE WITNESS: Yes, but it is uncommon to commit to a specific number.

THE COURT: But you understood it to be an estimate all along, didn't you?

THE WITNESS: Yes, sir.

THE COURT: Had you had experience in other instances where the taxes exceeded the estimates?

THE WITNESS: Generally they would be fairly close -- in fact, In most cases the first year they would be less.

THE COURT: Had you had experience where they

exceeded it?

THE WITNESS: Yes.

THE COURT: And would that be so in the last five or six years preceding this instance?

THE WITNESS: I can't recall instances where it would have exceeded them by enough so that there would be a problem or that there would be a question.

THE COURT: Well you were aware in general that taxes were on the increase?

THE WITNESS: Yes, sir.

THE COURT: And you expected it, didn't you?

THE WITNESS: Oh, yes, certainly, normally tax increases you would expect.

THE COURT: And you were also aware of the inflational spiral we had been having --

THE WITNESS: Yes, certainly.

THE COURT: -- ~~after World War.~~ IN 1974 Did you expect that would have some impact on the estimated common charges?

THE WITNESS: Certainly.

THE COURT: Which way did you think they were going to affect it?

THE WITNESS: I felt that they would increase, as the consumer products index might increase.

Q Did you say it is typical of shopping center leases, for more leases to have estimates in the lease on taxes?

A Of payments, of tax payments, billing. There could very well be in the lease an estimate as you have for common area expenses to say that the tenant will be billed so much per cent per square foot, whatever it is.

Q In the lease?

A Sometimes, sure.

Q Isn't it a fact that it is the practice in the industry not to put any estimate with respect to taxes in the lease?

A It is not, no.

Q It isn't the practice?

A Billing. You may not call it estimate. This is what you would be billed and it would be adjusted.

THE COURT: You mean how you will be billed.

THE WITNESS: How you will be billed.

Q It doesn't say in there that the taxes are going to be one dollar or you will be billed at one dollar?

A It could say you will be billed at one dollar and it will be adjusted. You will have your pro rata share.

Q If that is so, why didn't you ask that the

dollar be put in this lease?

A Because Mr. Kirtland had estimated what that would be.

THE COURT: Didn't you read in the lease that it wasn't to be formally determined what your taxes would be?

THE WITNESS: Yes, sir.

THE COURT: Did you understand it?

THE WITNESS: Yes, sir.

THE COURT: Did you complain to Mr. Kirtland in any way that "This isn't what you represent"?

THE WITNESS: I complained --

THE COURT: At that time.

THE WITNESS: When we signed the lease?

THE COURT: Before you signed it?

THE WITNESS: No, I did not.

3 Q Had you ever been able to get in a lease that you negotiated a representation from the landlord that the taxes will not go any higher than X dollars and that the common area charges will not go higher than X dollars?

MR. BUTLER: Objection, your Honor. It is a question that is immaterial and irrelevant.

THE COURT: No, I don't think so.

MR. BUTLER: There is no issue here about the

mks J. Kelly - cross

taxes not going up, or the common area not going up.

THE COURT: Overruled.

A You are talking about a regional mall.

Q Well, let us talk about a regional mall first.

A Not that I can recall.

Q ~~This is a~~ Isn't it fact that in several instances where you had negotiated leases for Magnaleasing the landlord has specifically refused to give you any representation as to a maximum figure for the common area charges and taxes?

A That is correct, after this lease.

THE COURT: Well, didn't you tell us earlier that you did not ask to have that figure put in because you knew you couldn't get it?

MR. BUTLER: Your Honor, the testimony was that he did not ask to have a limit put on it.

THE COURT: I am not talking about that.

MR. BUTLER: There is no issue in here that there is a limit.

THE COURT: Do you want to answer my question?

MR. BUTLER: I am sorry.

THE COURT: If you do, take the witness stand.

MR.BUTLER: I am sorry, your Honor.

THE COURT: Would you answer?

THE WITNESS: Would you repeat it?

THE COURT: Read it.

(Record read by the reporter.)

THE WITNESS: That is partially true, and it is also true the fact that I believed Mr. Kirtland's estimates, and it is common practice in the industry that this is -- the only indication that any small tenant has of what it is going to cost him.

THE COURT: But you said as a mall tenant you had no power to put a limit on what the charges would be. Didn't you testify to that a while back?

THE WITNESS: Yes.

THE COURT: And therefore you did not seek it?

THE WITNESS: That is correct.

THE COURT: Did that come as a surprise at the time the lease was presented to you?

THE WITNESS: No.

THE COURT: You knew that all along, didn't you?

THE WITNESS: Yes.

Q Magnaleasing or Magnavox -- well, Magnavox is a small tenant in comparison to what you say -- what do you mean by your testimony that Magnavox or Magnaleasing was a small tenant?

A We were a three or four-thousand square foot tenant in an eight-hundred thousand square foot mall.

(Continued on next page.)

2 Q Isn't it a fact that over 400,000 square
3 of that space was taken by Sears and Macy's?
4 A Yes, yes.
5 Q So you were really a 3000-square-foot tenant --
6 A They were major tenants and we were small
7 tenants.
8 Q You regard Macy's and Sears as a tenant --
9 A Sure.
10 Q -- at the mall?
11 Do you know whether the 6.50 fixed rent
12 price that you were able to negotiate was a high or
13 a low figure in terms of some of the other tenants in
14 the mall?
15 A I do not know.
16 Q I show you a document that has been marked
17 as Defendants' Exhibit P for identification and I ask
18 you if you can identify that.
19 A This is a -- yes, it's a memo I sent to
20 Bill Cline.
21 Q And it is dated December 3, 1973?
22 A That's correct.
23 MR. BERGEN: I offer this in evidence,
24 Defendants' Exhibit P.
25 MR. BUTLER: I object, your Honor, on the

grounds of relevancy. It concerns utilities, and utilities is not an issue in this case.

MR. BERGEN: Your Honor, the reason I would like to --

THE COURT: Let me see it.

MR. BERGEN: All right.

(Pause.)

THE COURT: Is your purpose the last page of the exhibit, the letter?

MR. BERGEN: My purpose is the last page, your Honor, and the first page also.

THE COURT: All right, overruled.

(Defendants' Exhibit P was received in evidence.)

Q Do you recall discussing this memo with Mr. Cline, and who was Mr. Cline?

A Mr. Cline is Magnavox' director of facilities.

Q He is an employee of Magnavox?

A That's correct. Did I discuss the --

Q Yes. Do you recall discussing that memo and the documents attached to it with Mr. Cline?

A I don't recall the particular discussion but I did send it to him, yes.

Q Did you agree with Mr. Cline's statement

on the first page of that memo:

"According to the lease we have no choice but to pay the increased rate as I see it"?

A No.

Q You didn't? Isn't that your handwriting down in the lower left corner, "To Hank Grenesco. Okay to pay. J.K."?

A May I explain?

Q I am just asking you the question.

A I did approve it for payment, yes.

Q Okay.

Mr. Kelly, did you ever see the original complaint in this action before it was filed?

A I don't believe so, no.

Q Do you recall seeing the amended complaint before it was filed?

A No, sir.

Q Have you ever seen the complaint that was filed in this action since the action was commenced?

A Yes, I did.

Q I show you Defendants' Exhibit BB for identification and ask you whether that's a copy of the complaint and actually the summons attached to it.

A I believe it is.

MR. BERGEN: I offer it in evidence.

THE COURT: Is this the original complaint?

MR. BERGEN: Yes, it is, your Honor.

THE COURT: It is part of the record, isn't it?

Q Did you see the amended complaint since it was filed?

A Yes, I did.

MR. BERGEN: Your Honor, may I just see the complaint for a moment?

THE COURT: I am sorry.

Q Now, in the amended complaint the allegation is made in 10(b) that "At the time the plaintiff was negotiating its lease the mall was already more than 50 per cent leased."

Do you recall Mr. Kirtland saying that to you at any time?

A May I see that or would you read it again?

Q Referring to 10(b).

A You asked me if Mr. Kirtland used the figure 50 per cent?

Q Yes.

A No, he did not use the 50 per cent figure that I ~~can recall.~~

Q Do you know whether there is any provision in the lease that says anything about the mall being 50 per cent leased?

A No.

MR. BERGER: Mr. Butler, has the allegation 10(b), with respect to the other department stores, been dropped or is that still --

MR. BUTLER: No, that hasn't been dropped. I don't think we stipulated to that. No.

Q Did Mr. Kirtland ever tell you that the deal for the third department store was finished?

A No. He said they were in the final stages of negotiation and expected to announce signing the lease shortly.

Q But the lease hadn't been signed. He didn't tell you there was a lease signed.

A No. I asked him if the lease had been signed and he said no, the lease had not been signed.

Q In subparagraph (c) of paragraph 10 of the amended complaint, and I quote, it says:

"The tax rent would be approximately $1 per square foot per annum when the mall was fully operational and thereafter subject to normal tax increases."

Did Mr. Kirtland ever say to you that the

tax rent would be approximately $1 per square foot per annum?

A He said their estimate was -- for the tenants' share, their estimate for the tenants' share was $1 per square foot, but that it could very by as much as 25 cents either way.

Q But did he ever say that it was approximately that figure?

A I don't recall him using the word "approximate," no.

Q Can you explain to me why, when the complaint was amended, the word "approximately" was inserted before the allegation about the $1 per square foot per annum, and I show you paragraph 11 of the original complaint?

MR. BUTLER: I object on the grounds that the witness has first testified that he did not see --

THE COURT: Don't tell me his testimony. What's your objection?

MR. BUTLER: That it is immaterial and irrelevant.

THE COURT: Overruled.

MR. BERGEN: Can you read back the ques-

tion, please?

THE COURT: Why was the word "approximately" inserted in the amended complaint and omitted from the original?

THE WITNESS: I don't know.

Q Can you tell me why the word "approximately" was inserted in the amended complaint with respect to the 60-cent figure on common-area charges when it was not in the original complaint?

A I don't know.

Q Did Mr. Kirtland ever say to you that the taxes would be $1 per square foot per annum when the mall was fully operational, and I ask you specifically, did he ever say to you and "thereafter subject to normal tax increases?"

A No.

Q Does the lease say that?

A No.

Q Did Mr. Kirtland ever say to you that the common-area charges would be approximately 60 cents per square foot per annum "for the initial year of operation?"

A You are talking about those exact words?

Q Yes.

A No, he did not use those exact words.

Q And did he ever say to you that the 60-cent common-area maintenance charge would, and I quote, "thereafter be subject to normal increases due to inflation"?

A No. He did not use those words.

Q Is that language anywhere in the lease?

A Not that I know of.

Q Is the language "the initial year of operation" anywhere in the lease with respect to common-area charges?

A Sixty cents was the landlord's initial estimate.

Q I asked you a specific question. Does that language that the 60-cent charge for common areas would be for the initial year of operation -- does that appear anywhere in the lease?

A No.

MR. BERGEN: Your Honor, may I just offer the amended complaint as an exhibit?

THE COURT: You don't need to. They are part of the record.

MR. BERGEN: Thank you.

THE COURT: They are court documents.

MR. BERGEN: If I might just have a minute to find a document, your Honor.

Q Mr. Kelly, I show you a document that has been marked as Defendants' Exhibit CC for identification and ask you if you can identify that, please.

A Yes. It's a memo from me to Mr. Minahan.

Q Dated August 3, 1973?

A That's correct.

MR. BERGEN: I offer Defendants' Exhibit CC into evidence.

MR. BUTLER: I have no objection, your Honor.

THE COURT: It is received.

(Defendants' Exhibit CC was received in evidence.)

Q Do you recall if there was an estimate made of the fixturing costs for the store at the Staten Island Mall?

A Yes.

Q That estimate was far under the actual cost, wasn't it?

A Yes.

Q Your memo to Mr. Minahan explains why the estimate was wrong?

A May I see the memo?

Q Yes. I show you Defendants' Exhibit CC.

A Yes.

Q I show you a document that's been marked as Defendants' Exhibit J for identification and I ask you if you can identify that.

A Yes.

Q Can you identify that letter?

A Oh, I'm sorry. It's a letter from Feist & Feist, George Kirtland, to myself.

MR. BERGEN: I offer Defendants' Exhibit J.

MR. BUTLER: I have no objection, your Honor.

(Defendants' Exhibit J was received in evidence.)

xx Q After this letter, Mr. Kelly, where Mr. Kirtland sent you draft copies of the lease, you had no further contact with Mr. Kirtland with respect to this lease?

A No. There was a telephone conversation -- you mean prior to signing the lease?

Q Yes.

A No, I don't believe so.

THE COURT: We will take our luncheon recess at this point until 2:30.

MR. BERGEN: I will be able to finish very quickly when we come back, your Honor.

THE COURT: All right. How much longer do you think you will be? I have people waiting for me. If you are going to be just a couple of minutes --

MR. BERGEN: No, it will be more like 15 minutes, 20 minutes.

THE COURT: All right.

(Luncheon recess.)

AFTERNOON SESSION

(2.30 p.m.)

J O H N K E L L Y , resumed.

CROSS EXAMINATION (Continued)

BY MR. BERGEN:

Q Mr. Kelly, in May 1974 do you recall having a meeting with the people from Feist & Feist?

A Yes, I do.

Q Where did that meeting take place?

A It took place in Feist's New York office.

Q And was that a meeting called at your request?

A It was called at Mr. Feist's request.

Q And who was present at that meeting?

A John Feist, myself, Bill Cline, Larry Eisenberg was there -- I think that's it.

Q Do you recall writing a memo to Mr. Michaelson about that meeting?

A Yes.

Q I show you a document that has been marked Defendant's Exhibit Q for identification, and I ask you if you can identify that document (handing)?

A Yes.

Q Is that a copy of your memo to Mr. Michaelson?

A Yes, it is.

Q Dated May 17, 1974?

A That is correct.

MR. BERGEN: I offer Exhibit Q in evidence (handing).

MR. BUTLER: I have no objection, your Honor.

THE COURT: Received.

(Defendant's Exhibit Q was received in evidence.)

xx BY MR. BERGEN:

Q Mr. Kelly, does Defendant's Exhibit Q accurately reflect what took place at the meeting of May 16, 1974 (handing)?

A Yes.

Q Did you tell Mr. Feast and Mr. Eisenberg at the meeting on May 16 that the Staten Island Mall had committed a fraud with respect to this lease?

A I said they misrepresented the costs and we relied upon those costs to our detriment, and that the whole goddamned mall was a disaster -- it was still half empty. Their estimates had increased by three or four hundred per cent, so-called estimates. They held themselves out to be experts, they managed malls all over New York area and they couldn't even figure out what in hell the goddamned common area costs were going to be. Isn't

that ridiculous?

Q Did you say anything in this memo that they had misrepresented facts to you?

A I will have to read the memo.

(After examining) I do not see it in this memo. It was in a letter that I sent to them before we arranged the meeting.

Q Earlier this morning you had talked about this map -- these two leasing plans (indicating)?

A Yes.

Q And I believe you indicated the large black dots indicated where a lease was signed, is that correct?

A As of October 10 -- no -- yes, as of October 10.

Q 1972?

A Yes.

Q And the small black dots -- I think there are three of them here (indicating) -- indicated that the lease was out for signature?

A That business terms had been agreed upon and the lease document was in the hands of the tenant for signature.

Q And soem of the spaces on these two leasing plans, Plaintiff's Exhibits 20 and 21, also already had some names printed on it?

A That is correct.

Q So I assume those leases had already been signed also. Did Mr. Kirtland explain that to you?

A I don't recall. I thought it was my impression that they had been signed.

Q Is the handwriting in pen that of yours in the left-hand corner on No. 20 -- like on 206-A -- is that yours?

A Yes, it is.

Q And were these different stores or lessees that Mr. Kirtland had told you --

A Yes.

Q -- had agreed to lease that space?

A Yes.

Q I believe you also testified that Mr. Kirtland said that the entire mall was leased except for two spaces?

A That is not what he said.

Q What did he say?

A He said the entire mall in our size range -- we were talking about three to four thousand square feet or thereabouts -- in our size range, there were only two available spaces in the whole mall. Everything else was leased.

Q In your size range?

A In our size range, that is correct.

Q Where was your store supposed to be -- or where is it?

A This was the original location we talked about (indicating), and this is where we -- I can't see it now but it is about here (indicating).

Q Now I believe this morning Mr. Butler asked you a question about a provision in the lease that provides that as soon as practicable, or around the time that the lease is supposed to commence, the landlord would give an estimate -- do you recall that -- an estimate of the taxes?

A Of the taxes?

Q Yes.

A Yes.

Q Isn't it a fact that the second -- no, the fourth page, the August 6th, 1973 letter, which is part of Plaintiff's Exhibit 4, is that an estimate (handing)?

A Yes.

Q You did receive that estimate.

A Yes, I did.

2 Q Now, with respect to the document that we
3 marked before, this morning, which was your lease
4 comments --
5 A Yes, sir.
6 Q -- isn't it true that there were only four
7 comments made by you with respect to sections 4.5 and
8 5.3, which covered taxes and common area-charges respec-
9 tively?
10 A Is that what it says? You are talking
11 about section 4.5?
12 Q There weren't any comments about the common-
13 area section, isn't that correct?
14 A 5.1. 5.1, 3, 4. The common-area sec-
15 tion?
16 Q Yes.
17 A I believe it was 4.
18 Q 5.3.
19 A The 5.3 section, the subsection of the common-
20 area section.
21 Q Yes. There weren't any comments?
22 A Yes. There weren't any.
23 Q The comments that you made with respect to
24 section 4.5, dealing with taxes, none of those refer
25 to the fact that the $1 estimate wasn't in the lease?

A That's correct.

Q When you were negotiating leases for Food Fair, were they shopping center leases?

A Yes.

Q Isn't it also true that you worked in real estate for Sun Oil before Food Fair?

A Yes.

Q So you have had a number of years' experience in real estate?

A Yes.

Q On the day that you were at the Staten Island Mall, December 4, 1972, what was the state of construction of the mall?

A Oh, the mall itself was under construction. The two department stores -- Macy's was open for business. Sears was also under construction.

THE COURT: What do you mean by the mall itself?

THE WITNESS: I am talking about the mall -- when we talk about the mall, we mean the section between Sears and Macy's, which is occupied by the smaller tenants. Maybe I can show you. This area in here.

THE COURT: I understand.

Q The only store that was open was the Macy's store?

A Yes.

MR. BERGEN: I have no further questions.

REDIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Kelly, it has been stipulated and you testified earlier, just a minute ago, that on August 8th, I believe it is, that you received the tax bill, August 8, 1973, of 2.45. It is stipulated that you sent a letter of complaint with respect to that.

It is also stipulated that the common-area charge of 2.58 was first received by yourself on April 15, 1974. Was that the first time, Apfil 15, 1974, that you heard that common-area charges were going to be more than 60 cents?

A Yes.

Q And were you back-billed? Or what price did you learn at that time?

A Let me explain how they handled that one. They took on August -- let's see, August of '74 -- I'm sorry; April of '74 they back-billed us for the 2.58 or 2.45; I think it was 2.45 at that time. They back-billed us to January 31st.

Q Of what year?

A Of that same year, '74. Then in December of '74 they sent another bill back-billing us for the portion from the time we opened, August of 1973 through January 31st of 1974.

Q Just so it is clear, you first learned of the common-area charge on April 15, 1974?

A That's true.

Q It is stipulated that after that you wrote a letter complaining in which you claimed there was misrepresentations, you had the meeting with Mr. Feist, which we just testified to, in May. At that meeting what relief did you request?

A I requested they reform the lease to give us what they represented to us, basically.

Q And what did you tell Mr. Feist at that meeting relative to your complaints?

A Well, I reiterated my complaints in the letter I sent him which covered just about everything: That the mall was still half empty, almost half empty, that the common-area maintenance charges and the real estate charges were totally out of proportion. The whole thing was a disaster.

Q That's the first time you appreciated the

problem, after you got the common-area charges on April 15th, isn't that correct?

A Yes.

Q Did the oil embargo affect taxes?

A No.

MR. NEWMAN: Objection.

MR. BERGEN: Objection.

THE COURT: If the witness knows.

MR. BUTLER: Your Honor, they asked a whole series of questions before.

THE COURT: I told him he can answer it if he knows. Do you want me to tell him he can't answer it? You asked the question.

Q This morning we went into two terms which were used, "estimates" and "limits." Would you tell me what you mean by the term "limit" and what you mean by the term "estimate"?

A Well, an estimate is a representation made by someone that a cost will be X dollars. Depending on who it is made by, you can expect it to vary. A limit is a limit of dollars. It is perhaps a limit of a dollar. So it would be 25 cents or 50 cents, but it won't go over $1.

Q Is that for the life of the lease?

A Yes.

Q An estimate is a figure you receive --

A At a given period of time.

Q And your expectation is that that would increase with inflation or whatever?

A Yes.

MR. BUTLER: I have no further questions.

THE COURT: Any recross?

MR. BERGEN: Very briefly.

RECROSS EXAMINATION

BY MR. BERGEN:

Q The back-billing, that was in accordance with the lease?

A Yes, but why did they wait another year to bill us.

MR. BERGEN: No further questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Next witness.

MR. BUTLER: Your Honor, if I may, I would like to get the answer from Mr. Feist to that question.

THE COURT: All right. Mr. Feist.

MR. BERGEN: Mr. Feist is here, your

Honor. He has brought with him some memoranda prepared by -- the problem is I don't know whether Mr. Feist can -- we don't have the bills because the bills are really meaningless because there is a fluctionation in the use. In other words, as more tenants move in the bills go up, so that wouldn't really reflect the fact that the oil embargo or whatever happened increased the utility charges.

We do have a couple of memos that were prepared by Feist & Feist when we called them last night which reflect the difference, the increases in what I believe are the kilowatt-hour charges.

THE COURT: You got into the subject, as I recall. You got somebody to answer a question that the oil embargo substantially increased these rates beyond anyone's reasonable expectations, or at least that was implicit in your question. I want to see it.

MR. NEWMAN: Your Honor, we have the engineer --

THE COURT: Let's get the witness on. I am not interested in what lawyers want to talk about. If you want to visit, meet me in a bar some night after work. Here I want to hear evidence.

MR. BERGEN: Mr. Feist can't explain them.

THE COURT: Who can?

MR. NEWMAN: We have Mr. Pat Dunne, who is our engineer.

THE COURT: All right, put him on.

P A T R I C K D U N N E, called as a witness by defendants, beign first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NEWMAN:

Q Mr. Dunne, who are you employed by?

A Feist & Feist.

Q What is your position?

A Chief engineer.

Q How long have you been so employed?

A A little over five years. Five and a half years.

Q Are you familiar with Con Ed's rate structures over the previous four or five years?

A Yes, I am.

Q I show you a series of documents marked as Defendants' Exhibit DD for identification. I ask if you can identify these documents for the record.

A Yes, I can. These are various rate struc-

tures for various periods of time which are noted in the lower left-hand corner.

Q What is the earliest such rate structure date?

A January 10, 1973.

Q And the last rate structure?

A August 23, 1975.

Q Is each of these rate structures promulgated by the Public Service Commission of the State of New York?

A Yes, they are.

MR. NEWMAN: I offer Defendants' Exhibit DD into evidence.

MR. BUTLER: No objection.

THE COURT: Received.

(Defendants' Exhibit DD was received in evidence.)

xx Q Just in order to short-cut it a little, Mr. Dunne, can you tell us, with respect to the Con Ed rate structures, the initial, meaning from January 10, 1973, charge per kilowatt hour?

A The charge per kilowatt hour, at the usage that we contemplated, 1.48 cents per kilowatt hour.

Q And as far as the initial, again, 1973,

early January, per kilowatt price with respect to Con Ed, what was that?

A You are speaking of the demand charge?

Q Yes.

A That was $4.21.

Q Now, the current demand charge price for the rates currently in effect on a per kilowat basis?

A Including the adjustment for the surcharge in the summer months, it averages out to just under $9. I believe it is 8.91. But I don't know the exact number. It is just under $9.

Q In order to make these numbers meaningful, let's try to translate them into dollars. Can you tell us the increment in the dollar expenditure based on the difference between the initial rates in effect in January, 1973 and the rates in effect since August 23, 1975? Again speaking strictly to the Con Ed rate structures.

A Are you speaking now of dollars or percentages?

Q Dollars.

First let's take percentage and then dollars.

A Well, the demand charge has gone up by approximately 70 per cent and the energy charge pri-

marily -- not only due to the rate increase but also the fuel adjustment -- has gone up by better than 150 per cent over and above the original figures. Maybe it's 2-3/4 times.

Q Can you translate that into dollars in the same time period, early '73 and the latest?

A Yes. The original estimate was approximately $110,000.

Q For?

A For demand and energy for the kind of usage we contemplated at that time for the mall for common area.

Q For electricity?

A For electricity, yes.

Q Just electricity?

A Right.

Q And now?

A At current rates it is approximately 270,000.

2 Q I show you Defendant's Exhibit EE for identi-
3 fication. The first page is a series of handwritten notes,
4 and the rest are service classifications promulgated by the
5 Public Service Commission -- which recite that they are
6 promulgated by the Public Service Commission.
7 Is this your handwriting on the first page?
8 A Yes, it is.
9 Q And what is it dated?
10 A 12-4-72.
11 Q Did you create that document on or about that
12 date?
13 A Yes, I did.
14 Q For what purpose?
15 A In order to determine what the charges for
16 heating and cooling and fuel would be.
17 Q Are these based on rate structures issued
18 pursuant to the request of the Brooklyn Union Gas Company?
19 A Yes, they are.
20 Q And promulgated by the Public Service Commission
21 for the State of New York?
22 A They are.
23 Q Are they a matter of record?
24 A They are a matter of record. They can be
25 obtained from the PSC.

Q And are the Con Ed series of rate structures also a matter of record?

A Also.

MR. NEWMAN: I offer in evidence Exhibit EE (handing).

MR. BUTLER: No objection, your Honor.

THE COURT: Received.

(Defendant's Exhibit EE was received in evidence.)

xx BY MR. NEWMAN:

Q The rate structure in effect as of May 3, 1972 for Brooklyn Union Gas usage, what was the average cost as of that date in May of 1972 on a per 100 cubic foot basis?

A 11-1/4 cents.

Q And at the currently prevailing rates with respect to the Brooklyn Union Gas Company on a per 100 cubic foot basis, what is the cost today?

A 31-2/3 cents.

Q Can you do what you did before -- translate that into percentages and then dollars?

A Well it is approximately 300 per cent today as compared to 1972; and in dollars we go from approximately $40,000 to $120,000 as of November 1975.

Q Did you predict these increases?

A No, I did not -- I could not.

Q Why not?

THE COURT: Oh, come on!

A I think that would be abnormal.

MR. NEWMAN: Would your Honor like to see this?

THE COURT: No.

MR. NEWMAN: I have no further questions.

THE COURT: What percentage does the light bill, the electricity, bear to the total common area costs?

THE WITNESS: Just the electricity or all the utilities?

THE COURT: Just the electrical charges -- that is what we have been talking about.

THE WITNESS: At today it is probably --

THE COURT: Then and today.

THE WITNESS: Today it is 35 per cent.

THE COURT: Yes, and what was it in 1972, in May of 1972?

THE WITNESS: Let me see -- probably about 25 per cent.

THE COURT: So it increased 10 per cent, the proportionate share.

THE WITNESS: The proportionate share, yes.

CROSS EXAMINATION

BY MR. BUTLER:

Q Mr. Dunne, isn't it true that a substantial part of the increase in the charges of Con Ed weren't you to increase in demand?

A The numbers that I related were based on --

Q Will you please answer the question, sir?

A Would you repeat the question?

(Question read by the reporter.)

MR. NEWMAN: Objection as to form.

THE COURT: Overruled.

Answer it?

A Yes.

Q And by "demand" I mean more people using more electricity -- that is "demand" -- right?

THE COURT: That is what I have always understood it to be.

THE WITNESS: All right, yes.

Q So a substantial portion of the Con Ed bill was due to the increase in demand, isn't that righ t?

A Yes.

MR. BUTLER: I have no further questions.

MR. NEWMAN: I have nothing further.

(The witness starts to leave the witness stand.)

MR. BUTLER: May I ask just one other question -- well, never mind, I am sorry.

(Witness excused.)

MR. BUTLER: If I may, I would like to call Mr. Feist, just to close this issue down.

- -

J O H N F E I S T , resumed, having been previously duly sworn, testified further as follows:

THE CLERK: Just to remind you that you are still under oath, sir.

REDIRECT EXAMINATION

BY MR. BUTLER:

Q I show you Plaintiff's Exhibit 29 for identification, which is a memo from John Grogan to yourself (handing).

A (After examining) Yes.

MR. BUTLER: I show this to Mr. Bergen, and I offer it in evidence (handing).

MR. BERGEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 29 was received in evidence.)

xx BY MR. BUTLER:

Q Mr. Feist, in Plaintiff's Exhibit 29 there is a

statement of the common area charges, actual common area charges as audited by Leidesdorf; and on the third page a comparison of those figures with the originally budgeted figures for the mall.

I show you that and ask you if that is correct (handing)?

A (After examining) Will you please repeat the question?

(Question read by the reporter.)

A It says on this document "Original budget", and it says, "Annualized".

Q The annualized is the extension of the figures on page 2; is that correct -- taking the actual figures and extending those for a full year -- is that what they have done?

A I assume that is what they have done.

Q On the third page, the originally budgeted estimated costs were common area charges for the mall $910,800; is that correct?

A (After examining) $910,800, that is correct.

Q Was that budget prepared prior to the opening of the mall?

A I would have to see the date of the memo.

(Witness examines.)

Q A comparison of costs with budgeted figures?

A August 1974 -- that is after the mall was opened.

Q No, that is not what we are talking about. We are talking about comparing the actual costs with your budgeted costs.

A There is no date on that document.

Is there a date on the document before?

Q That is the question I am asking you.

A I don't know. There is no date -- wait, excuse me, there is a date. It is from 8/9/73 to 1/31/74.

Q That is the next page, the next page for the next year?

A That is this page (indicating).

Q This figure here is a photocopy of a sheet annualizing -- comparing the costs with the budgeted costs, is that right?

A Yes, sir.

Q And they are comparing the costs of 8/9/73 and 1/31/74 with the budgeted costs; is that correct?

A That is correct.

MR. BERGEN: Budgeted costs for when?

MR. BUTLER: When the original budget was prepared.

MR. BERGEN: The budget says the same thing --

it says 8/9/73 to 1/31/74.

Q That is what the budget was for?

A That is correct.

Q And that was prepared before the mall opened, isn't that right?

A Not that I know of.

2 THE COURT: When did you prepare the original the originan budget? When was it prepared, don't you know?

THE WITNESS: We prepred about 20 different budgets, your Honor.

THE COURT: When did you prepare this one?

THE WITNESS: I did not prepare that one so I don't know.

THE COURT: When was it prepared by your outfit, Feist & Feist?

THE WITNESS: I assume in August.

THE COURT: August of 1973.

THE WITNESS: '73, yes.

THE COURT: The date shown on here.

THE WITNESS: That is correct.

Q Mr. Feist, are you a member of the New York State Realty Board, Inc.?

A That is correct.

MR. BUTLER: I have no further questions, your Honor.

MR. BERGEN: I have no further questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: We will take a short recess.

(Recess.)

H E N R Y G R E N E S K O, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BUTLER:

Q Mr. Grenesko, by whom are you employed?

A The Magnavox Company.

Q How long have you been employed by the Magnavox Company?

A Nine years.

Q Will you describe just briefly the scope of your employment?

A Yes. Right now I am employed in the marketing department. During the year of '73 I was employed through Magnaleasing in helping -- in reviewing financial statements of dealers who are interested in getting into regional malls and using certain guidelines that we had to determine whether or not the fixed and variable expenses would enable them to get into a mall based on the costs.

Q Did Magnaleasing make the imporvements at the mall, the store at the mall?

A In some of them they did, and some of the dealers made the improvements themselves.

Q The mall at Staten Island.

A Yes, we did.

Q How much did the improvements cost?

A The improvements were $107,000.

Q What is your factor for depreciation?

A Of the life of the fixturing?

Q Yes.

A Ten years.

Q How long have the fixtures been in there?

A Twenty-seven months.

Q Mr. Grenesko, do you oversee the payment of bills, tax bills, rent bills for stores which Magnavox or Magnaleasing are connected with?

A I do for some. In particular instances if a dealer gets into financial trouble, if he is unable to meet the expenses himself, in order to help the dealers survive we will negotiate a different occupancy schedule, perhaps based on a percentage of sales, at which time we bill the dealer directly and I make payments to the developer out of my office.

Q Do you make payments to other persons? Do you oversee payments to other persons?

A No.

MR. BUTLER: I have no further questions.

CROSS EXAMINATION

BY MR. BERGEN:

Q Mr. Grenesko, were you at a meeting with Mr. Michaelson and Mr. Kelly on December 5, 1974?

A I can't recall the specific date.

Q Do you recall a meeting with Mr. Michaelson and with Mr. Kelly in December of 1974 prior to the commencemnet of the lawsuit where the Staten Island Mall problem was discussed?

A Yes.

Q I show you Defendants' Exhibit E for identification and ask you if you have ever seen that document.

A Yes, I have.

Q Do you recognize the handwriting?

A Yes, I do.

Q Whose is it?

A Mr. Michaelson's.

MR. BERGEN: I offer Defendants' Exhibit E for identification.

MR. BUTLER: I have no objection, your Honor.

THE COURT: Received.

(Defendants' Exhibit E was received in

evidence.)

xx Q Do you recall Mr. Kelly saying at that meeting that you were going to file this lawsuit and that he thinks you will lose?

A I don't recall his saying that we were going to file a suit at that particular time. I do know that the subject was brought up. I do recall his saying that it was a difficult suit. I don't recall him exactly saying that we were going to lose.

MR. BERGEN: No further questions.

MR. BUTLER: I have no questions, your Honor.

THE COURT: You are excused.

(Witness excused.)

MR. BUTLER: Your Honor, I would just like to read one sentence -- just a few sentences into teh record and may I give you a copy of them. These come from the examination of Mr. Irving Feist, who I understand could not be here. I am just referring simply to pages 98 -- is that 98 and 99? Yes, 98.

"Q In that sense you were the top man. You testified" --

THE COURT: Why don't you just offer pages 98 and 99.

MR. BUTLER: I will offer pages 98 and 99 in evidence.

THE COURT: All right, proceed.

(Plaintiff's Exhibit 31 was received in evidence.)

xx MR. BUTLER: We rest, your Honor.

THE COURT: We will reserve on motions as though made now. Proceed with the defense.

MR. BERGEN: Can we just get Mr. Eisenberg? He is our witness and he just stepped outside.

(Pause.)

MR. NEWMAN: We call Mr. Lawrence Eisenberg to the stand.

L A W R E N C E E I S E N B E R G, called as a witness by defendants, being first duly sworn, testified as follows:

MR. BUTLER: Your Honor, we are going to make an objection to Mr. Eisenberg testifying. We had never expected him to testify. At the time that the lease was prepared and the many negotiations with the lease were conducted, Mr. Eisenberg was with the law firm of Marshall, Bratter and these matters were matters which were handled by that firm. He subsequently, after this lease was entered into, some time

in later '73 I guess it was, went to work for Feist & Feist and now he is with Feist & Feist, and I think it is inappropriate for a firm which has an associate of itself involved in the Staten Island Mall, as Mr. Eisenberg was, to testify in the main on a trial of this nature.

THE COURT: Why?

MR. BUTLER: As a conflict of interest, your Honor.

THE COURT: Why?

MR. BUTLER: It is against the canon of ethics.

THE COURT: Where is the conflict of interest? Wasn't it the client of the firm and he worked for the firm?

MR. BUTLER: Now he is a party, your Honor.

THE COURT: He is testifying. If there is any privilege, it is certainly the client's privilege.

MR. BUTLER: It's a principle of the canon of ethics. I cannot have any member of my firm, any associate, take the stand in a case which I am trying.

THE COURT: It's a new rule to me.

MR. BUTLER: Your Honor, it's a principle of the canon of ethics. It's a specific canon that an associate or partner or anyone in the firm cannot testify on a trial with respect --

MR. NEWMAN: Mr. Eisenberg is not an associate in the firm of Marshall, Bratter.

MR. BUTLER: He was at the time.

THE COURT: I will take his testimony subject to striking it if it is improper. I don't think the canon fits this situation.

MR. BERGEN: Your Honor, may I just add that they took Mr. Eisenberg's deposition for about six days in this case.

MR. BUTLER: Mr. Eisenberg was the only one who was produced at that time.

DIRECT EXAMINATION

BY MR. NEWMAN:

Q Mr. Eisenberg, by whom are you employed?

A Feist & Feist.

Q In what capacity?

A General counsel.

Q Do you hold any office within Feist & Feist?

A No, I do not.

Q Do you hold any office within defendant Flackfriars?

A Yes, I do.

Q What is that?

A Vice president.

Q For how long have you been employed by Feist & Feist?

A Since September of 1973.

Q Prior thereto were you an associate at Marshall, Bratter?

A Yes, I was.

Q For how long?

A Five years.

Q In what specialty, if any, did you practice at Marshall, Bratter?

A Real estate.

Q Can you be more specific with in real estate?

A Well, I was involved in the general practice of most, if not all, phases of real estate law.

Q Including leasing?

A Certainly including leasing.

Q Including leasing for Staten Island Mall?

A The vast majority of my time, I would say

at least 75 per cent of my time for the last year or so, perhaps a little more than a year, probably a year and a half of my involvement with Marshall, Bratter, was primarily in negotiating leases.

Q That would be in '72 and '73?

A Yes.

(Continued on next page.)

Q Did you have any other leasing experience with Marshall Bratter?

A Generally or shopping centers?

Q Shopping centers in particular?

A I had that experience with Staten Island Mall and also I represented a number of national retail chains going into shopping centers, and I would guess I negotiated leases on behalf of tenants for most, if not all, of the major regional malls in the metropolitan New York area as of 1973.

Q Were you involved in any way in the preparation of the lease in this case, Plaintiff's Exhibit 15?

A Are you referring to the Magnaleasing lease or to the lease form?

Q To the lease form itself.

A Yes, I was; I was one of the attorneys who prepared it.

Q Who helped draft it.

A Yes.

Q I call your attention in particular to that section of the lease which has previously been referred to, which is Section 5.3-B, and in particular -- I won't read it again -- to that clause which we have been referring to as the 60-cent clause, the last sentence on that

page (handing).

A (After examining) Yes.

MR. NEWMAN: For the record this is the clause that begins "For purposes of the Period of the Commencement date to the date Landlord furnishes his first statement to the Tenant."

Q Can you tell us the derivation of that clause?

MR. BUTLER: I object, your Honor, as to its importance. The sentence speaks for itself.

MR. NEWMAN: I agree, except that Mr. Kelly specifically --

THE COURT: Please!

MR. NEWMAN: Your Honor, Mr. Kelly specifically testified that that clause was in accordance with Mr. Kirtland's alleged representation. The import of that clause is very relevant to this case.

MR. BUTLER: Your Honor, I must --

THE COURT: He is asking where it was derived. It has nothing to do with what it says.

Overruled.

MR. NEWMAN: Will you please read the question.

(Question read by the reporter.)

A By "derivation" you mean its purpose?

Q Yes.

MR. BUTLER: Objection to what the purpose is.

THE COURT: Sustained as to the purpose.

Q Will you tell us the need for a clause to that effect --

MR. BUTLER: I will object to that.

THE COURT: Sustained. This calls for the operation of his mind, a conclusion.

MR. NEWMAN: I am not going to his mind, your Honor; I am going to the facts.

THE COURT: Next question.

Q Can you tell us the procedures provided for under the Magnaleasing lease for the initial billing -- let us start first with the common area charges?

MR. BUTLER: Your Honor, the lease speaks for itself.

THE COURT: Sustained.

MR. NEWMAN: Your Honor, it is a 79-page lease, and I am trying to shortcut --

THE COURT: Sustained.

The procedures speak for themselves. If it is a 10,000-page lease -- and I am amazed that it isn't, judging by the stipulation of facts -- so-called facts.

Q It has been stipulated to, Mr. Eisenberg --

THE COURT: If you wish to direct my attention

to the paragraph in the lease I will have my attention directed, but I do not need this witness to read it to me, or any other.

Q It has been stipulated to, Mr. Eisenberg, that the tenant in this case, Magnaleasing, pays tax rent and also common area charges in accordance with a formula -- referring for the record to stipulations No. 43 and No. 41 -- each of which involve a denominator, as it has been previously referred to, as the denominator. That is for the record -- where the floor space of all leased or occupied space in the shopping center is the denominator.

There has also been testimony to the effect that there were other denominators in other leases. Can you elaborate on that?

MR. BUTLER: I am going to object to what was in other leases.

THE COURT: Sustained.

Put a question to him. Put questions.

Q Mr. Eisenber, are there in existence leases on the Staten Island Mall which involve alternative formulations?

MR. BUTLER: I'll object to that, your Honor, on the ground of immateriality and irrelevant, what other

leases contained.

MR. NEWMAN: I think it is very relevant, your Honor. I think the result achieved --

THE COURT: Obviously you thought it was relevant or you wouldn't ask it.

I am not interested in your thoughts. It is irrelevant. Sustained.

Next question.

MR. NEWMAN: Your Honor, the results achieved by this tenant we contend is in part a result of his negotiating abilities and not necessarily the alleged fraud in this case. I would like to demonstrate that.

THE COURT: Do you have to demonstrate that any more is the 23rd of March, that the room is yellow!

Q Are there tenants on a leasable basis in the Staten Island Mall?

MR. BUTLER: I object to that on the ground that that is irrelevant as to what other tenants have as their bases.

THE COURT: Let me see the clause in the lease that you are referring to.

Let me see the denominator of the formula -- that is what you are talking about, isn't it?

MR. NEWMAN: Yes, your Honor. For the record

it is in Section 5.3-A2, the formula in particular --

THE COURT: Let me see it.

(Mr. Newman hands to the Court who examines.)

THE COURT: Now what is your question?

(Question read by the reporter.)

THE COURT: I don't know what you are talking about.

MR. NEWMAN: Your Honor, the testify so far has referred to that clause in shorthand references as tenants on a leased basis, because the phrase is "leased or occupied".

I would like to demonstrate through this witness that there are alternative formulations, namely, on a leasable basis, and the consequences of that formulation.

THE COURT: I do not know what you mean by "leasable basis" as against "leased basis".

What are you talking about?

MR. NEWMAN: There is a significant difference, your Honor.

THE COURT: What is it?

MR. NEWMAN: Very simply stated, the leased basis means the number of actual square feet.

THE COURT: I would think so but what is this "leasable basis"?

MR. NEWMAN: Leasable basis means the number of square feet to be leased -- a very different number, which I would like to demonstrate that some tenants were able to negotiate.

THE COURT: I sustain it as immaterial.

BY MR. NEWMAN:

Q Mr. Eisenberg, for purposes of the next question I would like you to assume that Magnaleasing had effected a recision of the lease in this case in or about October of 1973. For the record, that is two months after the initial tax statement was sent out.

Would it have been easier or harder --

MR. BUTLER: Judge --

THE COURT: Let him finish the question.

Q (Continuing) -- would it have been easier or harder for the mall to relet the premises then than now?

MR. BUTLER: Objection, your Honor.

THE COURT: Sustained.

MR. NEWMAN: Your Honor, that goes to our laches argument, the prejudice done by the plaintiff in the delay in filing this lawsuit.

THE COURT: Sustained. I am not interested in this witness' opinion.

MR. NEWMAN: This witness does it for a

1 ks8 Eisenberg - direct 287

2 living.

3 THE COURT: I don't care what he does for a

4 living.

5 BY MR. NEWMAN:

6 Q Do you know when Magnaleasing was rendered its

7 initial tax estimate in this case?

8 A Shortly before the opening of the mall -- I

9 think it was August 6 of 1973. The mall opened on August

10 9th.

11 Q It has been stipulated to that Magnaleasing's

12 tax rent at or about that time was estimated at approx-

13 imately $2.45. By comparison do you know what the tax

14 rent was fixed at for tenants on a leasable basis?

15 MR. BUTLER: I am going to object to that, your

16 Honor. He is trying to bring it in through the back

17 door.

18 THE COURT: Yes, sustained.

19 Do you know what the level of occupancy was in

20 the months ensuing the signing of this lease and in the

21 months after the commencement of the summary proceedings?

22 You had a schedule here yesterday showing the

23 flow of occupancy.

24 MS. KAHLE: Exhibit 7.

25 MR. BUTLER: Exhibit 7.

THE COURT: May I see it?

(Mr. Butler hands to the Court who examines.)

THE COURT: Proceed.

MR. NEWMAN: I have no further questions of the witness.

MR. BUTLER: I have no questions, your Honor.

THE COURT: You are excused.

(Witness excused.)

MR. BERGEN: Your Honor, I would just like to introduce in evidence Defendant's Exhibit EE for identification, which are some pages from the deposition of Thomas Hafner, who is the Magnavox in-house lawyer.

I will just underline the portion --

MR. BUTLER: Your Honor, I am going to object to the introduction of any transcript. We have had everyone available here. We have made everyone available today, and I believe if they want them to testify, we made the offer. To start using transcripts at this late hour I think is unacceptable. Mr. Hafner is not a party to this litigation.

THE COURT: Is there some reason you cannot get him here?

MR. BERGEN: I did not think until just now that we would even be going to call him, and I am just

introducing some brief testimony that he gave (handing to the Court).

THE COURT: I take it you were present at this deposition.

MR. BUTLER: No, your Honor, I was not -- well, we were represented there, certainly.

THE COURT: (After examining) Well, this is largely cumulative.

All right, if you want to call him to cross-examine him, you may.

MR. BUTLER: What pages are they, your Honor?

THE WITNESS: 10 through --

MR. BERGEN: I have them here (indicating to Mr. Butler).

THE COURT: It doesn't add anything that we haven't already heard a dozen times.

(Transcript pages of Mr. Hafner's testimony were marked Defendant's Exhibit W in evidence.)

xx MR. BERGEN: We rest, your Honor.

THE COURT: Any rebuttal?

MR. BUTLER: No, your Honor.

THE COURT: All right, I will hear your argument.

Make your motions now.

MR.BERGEN: Your Honor, we also have a counterclaim here for attorneys' fees. Shall we make the arguments now?

THE COURT: Well, can't we stipulate what they were? They are $85,000, according to your contentions. Whether those are reasonable attorneys' fees is another matter. That is what you content.

MR.BERGEN: Yes, your Honor.

THE COURT: Let us leave that for another day.

MR. BERGEN: Okay.

THE COURT: Let us hear the argument now.

MR. BUTLER: Your Honor, may we have a minute?

(Short informal recess.)

MR. BUTLER: I have no motions, your Honor. We will make our final argument.

THE COURT: The defendant makes a motion, I suppose, at this point, but before we come to that I would like to know what, if any, of the subdivisions of paragraph 10 of your amended complaint are left in this case, according to you.

MR. BUTLER: A, your Honor, B, C, D, E, and F was taken out and G I take out.

THE COURT: F and G are out.

All right, let's go.

MR. BERGEN: Your Honor, the defendants move to dis miss the case on several grounds. First, that the plaintiff has failed to prove a prima facie case of fraud. Mr. Kelly testified that despite what he was told he knew that these figures that he says were given to him of $1 and 60 cents were estimates. He also testified that he understood when he signed the lease the taxes and common-area charges would be paid in accordance with the lease, which was very detailed.

Mr. Kelly also testified that when he got the January 15, 1973 letter from Mr. Kirtland, which set out the basic terms of the lease prior to a draft of

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the lease being sent to Mr. Kelly a couple of weeks later, he never questioned the fact that this dollar figure that he testified about was not in that written letter from Mr. Kirtland, he never questioned that the dollar figure wasn't in the lease. He conceded that the clause in the lease which covers the initial billing period for the 60 cents for the common-area charges was exactly what Mr. Kirtland said, and again he conceded that they were going to pay these charges, the taxes and the common-area charges according to the terms of the written lease. They went on paying --

THE COURT: That's another point. You are getting into ratification, waiver, etc. Let's stay with the point which you are making now, that all this was open at the time they signed the lease. So what? So what?

MR. BERGEN: I don't understand the question that it was all open.

THE COURT: What does this lead to?

MR. BERGEN: It leads to the fact that anything that was said prior to the lease doesn't make any difference. Otherwise there wouldn't be any reason to have a lease and the whole purpose of having the lease is so that everybody knows where he stands.

THE COURT: Where is your case that says so? Do you mean if you in negotiations made a flat misrepresentation about something, that once I sign a written lease I can never complain about that? Is that what you are telling me?

MR. BERGEN: No. I am telling you that when statements are made about anything having to do with the lease and you don't attempt to get those statements incorporated into the terms of the lease, even assuming that they are made -- I mean there are specific provisions in the lease that cover this. I mean the least provision with respect to the 60 cents is very specific.

THE COURT: I read your brief and I looked for a case that says that, that it matters that you made a written lease. I don't even find one.

MR. BERGEN: I think the Romance Bridals case.

THE COURT: He doesn't cite a case for his proposition and you don't. And I haven't been able to find once since this morning.

MR. BERGEN: I think we again get down to that you are talking about --

THE COURT: Why do you say this is? You

just give me words: it's in the lease. Why would it follow that just because it's in the lease that it obliterates, pushing your point to its logical limits, all previous misrepresentations, assuming there were misrepresentations of fact? Why does it obliterate it?

MR. BERGEN: I think that's a question.

THE COURT: Is it because there is no misrepresentation, is that your argument?

MR. BERGEN: Were these misrepresentations a fact? I mean these were estimates.

THE COURT: That's another question. I am asking you to assume that they were. According to you, if I were to say to you, the principles of law that you are arguing, I am leasing you this building which I represent is made of aluminum and when in fact I lease it and you know it, it is concrete and not aluminum. You say I couldn't sue you for fraud, right?

MR. BERGEN: Yes.

THE COURT: Why?

MR. BERGEN: Because you are standing there and you can look at the building just like I can.

THE COURT: You are saying there is no

misrepresentation or are you saying that there is no reliance or both or which?

MR. BERGEN: I am saying that there isn't a misrepresentation if you can sit there and look at it and see that the building is not made of aluminum and is made of concrete, then you couldn't possibly rely on it.

THE COURT: Assuming I am compos mentis and I can see.

Well, you haven't got a case that tells me that, but go ahead.

MR. BERGEN: The next step beyond that is whether these representations were representations of presently-existing facts or something that was going to happen in the future. These were clearly statements, if made, that were made of something that was going to happen in the future that I think everybody agrees that nobody could predict whether they would happen or whether they would not, and especially with respect to the 60 cents for common area. That clause could not be any more specific as to what it provided.

THE COURT: Well, suppose Mr. Feist had in his possession from an expert in the field that the common-area charges, the best we can determine them,

are going to be $2 and that very day he tells the prospective lessee that they are going to be 60 cents. Wouldn't that be a false representation?

MR. BERGEN: I don't think anybody was told that they were going to be 60 cents, they are going to be billed at 60 cents.

THE COURT: I am talking about under the law, wouldn't that be a false representation?

MR. BERGEN: I think if there was reliance on it and if it was a material issue --

THE COURT: We will come to the reliance later. Wouldn't it be a false representation?

MR. BERGEN: Yes.

THE COURT: The evidence shows he was practically bombarded with memoranda which told him that his 60-cent figure was wrong at the very least. He had memoranda, four or five that I recall, that showed him that it was going to be four or five times that much, and all the while he stuck doggedly to his 60 cents based on what he thought Korvettes was paying. That was the testimony.

MR. BERGEN: No, I am not sure that the 60 cents was the Korvettes. The 60 cents was --

THE COURT: The taxes.

MR. BERGEN: The taxes at Korvettes, I believe.

THE COURT: But why isn't that a basis for a misrepresentation of fact when he has information from within his own organization that his figure is wrong and he doesn't disclose that to the lessee or the prospective lessee, he just flatly represents -- Kirgland flatly represents -- it is going to be 60 cents?

MR. BERGEN: See, that wasn't the representation, first of all. It was represented and it was in the lease, the printed lease, that it was going to be billed at 60 cents.

THE COURT: That's your first point, your merger point. We are now going beyond that to whether there is a misrepresentation of a material fact.

MR. BERGEN: I think the fact that there were other estimates really helps us. There were a number of estimates that were all different, and I think it proves that there were people in the organization who had come up with estimates but nobody really was able to come up, you know, with a final, firm estimate that they could be sure was going to be even

accurate or close to accurate because of the problems of projecting what was going to happen, and I think the events that took place after proved it out.

THE COURT: Doesn't it come down to whether Feist himself believed at the time he made it that it was 60 cents and not 2.40? Doesn't it come down to that

If he dishonestly estimated it at 60 cents when all the information in his possession showed that he was wrong, that it was going to be 2 or 2.50, isn't that the question?

MR. BERGEN: Well, if he dishonestly represented it, but I don't think that there is any evidence to indicate that Mr. Feist dishonestly held to this 60-cent figure.

THE COURT: There are these almost contemporaneous memoranda. How do you explain it? He says he doesn't remember, he can't recall, he doesn't remember, but he was getting these periodically.

MR. BERGEN: I go back to what I said a few minutes ago, that these memoranda were coming to him, he didn't remember them, but they also had a number of different figures.

THE COURT: All substantially larger than

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his.

MR. BERGEN: That kind of gets to the point that we were trying to show with Mr. Eisenberg. I can't get into it, but this difference between leased and leasable --

THE COURT: Leasable obviously means available for leasing, I suppose.

MR. BERGEN: Yes, so that had you had huge figure, which is much larger than leased or occupied, as your denominator, your proportionate share of the rent would be lower.

THE COURT: There was never any representation here in the evidence that they were talking about leasable as distinct from occupied or leased, actually leased.

MR. BERGEN: That's just the point. If Mr. Kelly had realized the distinction between leased or occupied as the denominator and leasable and negotiated for that, as we would have shown that there were a number of tenants who did realize that distinction, the denominator would have been lower and the figures for the common-area charges and the taxes would have been a lot closer, a lot closer, to the 60-cent and $1 estimates. They wouldn't have been 2.35, or whatever they finally came out to be, and $4,

as the initial ones. That is really the key to this thing. There are other people who negotiated, who realized the distinction and who negotiated for a leasable denominator, which gives you -- or a portion of a leasable denominator; maybe 75 per cent. Those people wind up with common-area charges and taxes, their proportionate share, based on the formula in the lease, and everybody has got the same formula, either leased or leasable or some percentage of leasable.

That printed lease wasn't varied from tenant to tenant, except for that distinction, and those people who were able to negotiate and who realized the significance of having leasable as a denominator as opposed to leased or occupied wound up with common-area charges and taxes paying their proportionate share a lot closer and not very much higher than the 60 cents, which was estimated and which was in the lease and said this is what you are going to be billed at and the dollar to 1.25 for the taxes.

THE COURT: Where is the evidence that any such representation was made to these people?

MR. BERGEN: No, that's the point. There wasn't any representation. This was an arm's length transaction.

You know, Mr. Kelly did not pick up the significance of the language leased or occupied, I believe, until after, and I think some of the documents we introduced show he finally began to mention to people that it is leased or occupied and once the occupancy rate in the mall goes up, then our taxes are going to go down. But it is not a question of a representation being made to them. They didn't realize the significance of this and didn't bargain for it in an arm's length transaction.

THE COURT: All right, go on.

MR. BERGEN: The next step, I think, is whether these were representations of fact or whether they were representations or statements of something that was going to happen in the future and whether the plaintiff really had any right or business relying on these things.

Mr. Kelly said, "You know, I didn't ask to put them in the lease because I believed Mr. Kirtland." That doesn't make any sense at all. Why would you have even a written lease then? Why not just go out and because Mr. Kirtland told me in the January 15th letter that the fixed rent was going to be 6.50 and I was going to get a $4 allowance for construction

costs, why have a lease? Just go off and do that and every month just sit down and you figure out how much space you have and you multiply that times 6.50.

The purpose of the lease is to incorporate all of these things that are bargained for. To say that these speculations about what taxes were going to be and what common-area charges were going to be is even more ludicrous, that you were going to rely on these when you look at what happened in the latter part of 1973 and all through 1974.

THE COURT: If this were so, in the course of negotiations a landlord could make all kinds of blatant misrepresentations and leave the tenant to his own remedy.

MR. BERGEN: I think it goes to like when you are buying a house. If you go in and look at the house and the landlord -- I mean the owner of the house tells you certain things about the house that you can look at and you can observe or if the person who is selling it to you says, "I am going to sell you the garage and the car in it," but you don't put that in the contract and the day of the closing you go back to the house with the owner and he opens

the garage door and backs the car out and drives it away, and you say, "Hey, you said you were going to sell me the car also because it was in the garage," and he turns around and says, "That isn't in the contract; it says I am selling you the house and the garage." It's really like let the buyer beware.

When you are in an arm's length transaction like this and you can see with your own eyes and you can negotiate and you can put things in a lease to protect yourself, you have to do it. You can't just cavalierly say, well, I agree with that or I believe that or I believe this. It's like saying I believe we are going to be leased 3360 square feet. I am sure they went in and checked that space that it was 3360 square feet to make sure that was exactly what they were getting. Because suppose they signed the lease and they went in a couple of days later to start working on the store and they found out it was half that size. That's the whole purpose of the written document.

I think the last point, before we get to the waiver, is that the fraud -- you know there is clear law on this -- that it has got to be proved by clear and convincing evidence, and I don't think they

have satisfied that burden. You can't presume it. You can't talk about things that were speculative, that somebody was told.

The last point, I think, is the waiver, or estoppel, whatever you want to call it. In August of 1973 they got their first estimate of what the rent was going to be. They wrote a letter to Mr. Faughnan complaining about it and saying, "Hey, this isn't anywhere close to" --

THE COURT: What do you understand waiver to mean?

MR. BERGEN: Well, I understand waiver that by going along and paying the rent and maybe complaining --

THE COURT: You are spelling it out. What do you understand it to be as a principle of law?

MR. BERGEN: I think where you have some rights and you don't exercise those rights and somebody else changes his position because you haven't exercised those rights, then, you know, you have waived those rights. You have to act on them.

THE COURT: Do you have to know that you have those rights?

MR. BERGEN: Well, I think they knew

in August of 19 --

THE COURT: Do you have to know? Isn't waiver the voluntary relinquishment of a known right?

MR. BERGEN: Yes, I believe it is.

THE COURT: All right. This is just so we have the same term in mind.

All right, why was this a waiver?

MR. BERGEN: Well, it was a waiver because they knew in August of '73 what the rent was going to be. They got a first bill.

THE COURT: Yes, they had all kinds of legal opinions which you put in evidence that they didn't have a very good case, that they couldn't win, that it was weak, that it wasn't strong, that they wouldn't prevail.

MR. BERGEN: They didn't have that until July of 1974 because they really didn't do anything about it.

THE COURT: Mr. Kelly told him that. You put in all his memoranda saying that.

MR. BERGEN: Yes. In 1974.

THE COURT: Doesn't that demonstrate that they didn't know they had a right? All the advice

that they got was that they didn't.

MR. BERGEN: No. Mr. Kelly didn't say they didn't have a right. He said they didn't have a very strong case and he also testified that there weren't any facts that changed between the time that he wrote those memos and the time that they first consulted Keane and Butler after they were sued.

THE COURT: But if I go to a lawyer and he gives me bum advice, which wouldn't be unusual, and he says, "You can't sue on this, you have no claim of relief, you will lose,"so I don't do anything about it for a year. Then I go to another lawyer and he says, "Oh, heah. It seems to me this is a pretty good case. Let's sue." Have I slept on my rights? Have I waived them?

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MR. BERGEN: Yes. I think you have, because Mr. Kelly did not tell anybody that he didn't have any rights. He said, first of all "We haven't got a very good case."

THE COURT: Well, you can always sue!

MR. BERGEN: And, secondly, he also testified that they were just kind of waiting as things developed, and the only fact that changed, he says, as the costs went up -- and of course the costs went up because everything went up -- it was only until they got sued.

THE COURT: Assuming that they were fully aware of all their rights and did not do anything for 15 or 18 months -- is that what it is?

MR. BERGEN: Well, it is shorter with respect to, first, the common area charge bill -- that was in April.

THE COURT: How long a period?

MR. BERGEN: I guess that was like seven or eight months.

THE COURT: What would the statute of limitations be here?

MR. BERGEN: I imagine it would be, on fraud, three years.

THE COURT: Six years.

MR. BERGEN: Six years.

THE COURT: Six years from the discovery of the fraud.

MR. BERGEN: Yes.

THE COURT: And you say if you wait six months that is laches and estoppel?

MR. BERGEN: Not only that you wait but why you wait and why you finally bring the lawsuit. You don't bring the lawsuit because you really think you were defrauded. You bring the lawsuit because the costs were so high that you are not really going to make money from the store any more.

THE COURT: Or because you got legal advice.

MR. BERGEN: So far as legal advice goes, I think that is just tough.

THE COURT: Well, that is the evidence before me.

MR. BERGEN: I know.

THE COURT: Was it Michaelson who said, "I can't believe that I haven't got a remedy here. What kind of a law is this?" -- taking a sensible businessman's view -- "if I have been wronged I have some kind of rights, and I don't believe what these lawyers say."

MR. BERGEN: I think Mr. Michaelson was saying

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something a little different. I think Mr. Michaelson was saying "Well, we have a very bad store. We have to fine some way to get out of it."

THE COURT: Sure he was saying that but he was also saying to Kelly "Go back to your books and see whether I have a right."

MR. BERGEN: Well, Mr. Kelly went back, apparently, because he wrote a memo.

THE COURT: All right; assuming all that, how are you prejudiced? How are you prejudiced?

MR. BERGEN: We are prejudiced because if they had asserted their rights and this lease had been rescinded, and there was a fraud proved, which I do not think they have proved, we could have gone out and leased that store rather than having, in effect, a vacant store sitting out there that was abandoned by Mr. Glichlich, after he got tired of fighting with Magnavox.

THE COURT: Where is the evidence that you could have leased that?

MR. BERGEN: We were trying to put that in through --

THE COURT: That is not evidence. Where is the evidence? You had all the people that were in on the negotiations on this lease; you had them on the stand.

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MR. BERGEN: Well, Mr. Eisenberg wasn't giving an opinion. He is the person -- he is one of the officers of Feist & Feist, and he could testify to that. He is involved in that type of work all the time.

THE COURT: He wasn't an officer at that time of Feist & Feist. He was not involved in the leasing of the property at that time except as a lawyer on the forms.

MR. BERGEN: He became an officer towards the end of 1973, and the time period we are talking about, if we had been able to lease that store we probably could have gone out and rented it, because after that Mr. Eisenberg testiied the market fell apart.

THE COURT: Well, there ought to be some evidence of that. Where is it?

MR. BERGEN: We do not have any because Mr. Eisenberg did not testify about it.

THE COURT: What about the schedule I referred to, Exhibit 7? Doesn't that show the level of occupancy had steadily been increasing up to October 1974?

MR. BERGEN: I am not familiar with that document. May I look at it, your Honor?

THE COURT: That is October 1973.

MR. BERGEN: That is my point. I think tied in

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with the waiver point, your Honor, is the fact that a lease that is allegedly fraudulently procured by the landlord isn't just void; it is voidable; and again we go to the point, if the tenant believes he has been defrauded but sits back and enjoys --

THE COURT: Enjoys the high rent?

MR. BERGEN: -- enjoys the high rent but he also enjoys the use of the premises for whatever purposes -- I think it is a little late to turn around an appreciable amount of time later and decide that he just doesn't want to operate that store. I really think you come down here to the fact pattern that demonstrates that they negotiated badly. They wound up with a bad lease, the economy turned down and the store started losing money, and they decided to cut their losses, "So we will close this store, we will close that store, we will get out no matter what" -- and I think that was the message in Mr. Michaelson's memo, "We have got to find a way to get out of there."

That basically is our argument, your Honor.

THE COURT: Thank you.

Mr. Butler, I would like you to address yourself to each of the alleged false representations and to marshal the evidence that you have to support representation by

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representation.

MR. BUTLER: That all of the rental space in the Staten Island Mall would be leased.

I might start off, if I may, your Honor, just the inference to which I believe we are entitled to is that the failure to call Mr. Kirtland, who was in their employ, to testify, to rebut any of the testimony regarding regarding any of these representations should create in our favor, I believe, an acceptance of these representations.

THE COURT: Well, these are allegations that I am talking about here. The failure to call a witness to rebut some testimony is one thing, but the failure to call a witness to deny an allegation is quite an unnecessary thing. The answer does that.

Where is the evidence?

MR. BUTLER: All of the rental space --

THE COURT: The burden is on you to show me by clear and convincing evidence that that representation was made, who made, when was it made, and where is the evidence?

MR. BUTLER: May I start with B and then work back to A, because B sets up a better chronological order.

In August of 1972 the Staten Island Mall, in a

circular, and advertising brochure given to its sales people in writing stated that more than 50 per cent for that mall was occupied, and that, your Honor, was false because the records show only 19 per cent of the mall was leased on that day.

The same information came out again in November, again an advertising circular, which was sent in November to Mr. Kelly, which Mr. Kelly read, as he testified, that Mr. Kirtland sent it, both circulars. These were to create enthusiasm and inducement --

THE COURT: Save the rhetoric. Give me the facts. That is what I want.

MR. BUTLER: Okay.

In November Kelly receives it. He reads it and comes in to New York -- over 50 per cent.

They arrive in New York. You have Kelly, Kirtland, Dale Kelly and Laxson. They go to the office. They are told -- they are shown plans -- plan No. I, plan No. II, second floor.

They are told that all this is rented, or just about to be, and he is given names, and he writes in all the names -- the names of tenants, and that all of this is full (indicating).

Your Honor knows from the record, in December,

that the level of occupancy is only 30 per cent. They never reached 50 per cent until May. So they go in there with the advertising brochures, believing that in November -- in August it was over 50 per cent, and all of this makes sense -- "90 per cent full"!

Mr. Kelly, Mr. Dale Kelly said that he said it was over 90 per cent full. That is an existing fact -- 90 per cent full is an existing fact. Both Kellys and Laxson relied on the statements regarding occupancy.

THE COURT: Where is it in the lease? You said in July. Is there any statement in the written lease that the mall is 50 per cent full?

MR. BUTLER: No, sir, and I do not believe that is the type --

THE COURT: Is there anywhere in any of the correspondence by anyone on your side of the case, any one of your people working for your client who says "Hey, where is this representation that the mall is half full?"

MR. BUTLER: They had it in writing, sir, right in front of them.

THE COURT: In the lease where is it? When they negotiated the terms of the lease?

MR. BUTLER: When they negotiated the terms of the lease they were told it was "Almost full".

THE COURT: Where is it in the lease?

MR. BUTLER: It is not inthe lease, your Honor.

THE COURT: Mr. Kelly was a lawyer looking at this lease, an experienced real estate man, and a lawyer.

MR. BUTLER: The occupancy of a lease --

THE COURT: Do you say that this representation survives Kelly's looking through that lease?

MR. BUTLER: I do indeed. I think it was a representation -- the representation was not to any specific terms -- the terms of utilities, the terms of this, the terms of construction.

THE COURT: Whatever the representation, if it was that the world was flat, does it survive the lease, which doesn't say that?

MR. BUTLER: If that representation is false, indeed it does.

THE COURT: Survive the lease which has nothing to say about it and which has a clause in it that says that all references to any representations made in the negotiations are out the window -- isn't there such a clause in this lease?

MR. BUTLER: Yes, your Honor, there is a clause, and the law of New York is that only -- that clause is only

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effective with regard to specific items. The items upon which you are suing must be the item which is referred to in that clause -- general clauses in leases under the law of New York are not effective to bar misrepresentation, statements made, oral statements made or statements made in writing prior to the lease.

(Continued on next page.)

THE COURT: Well, they are not effective to bar evidence of that under the parol evidence rule, but what about the representation itself? Isn't it going by the boards once you put your name on the lease?

MR. BUTLER: I don't believe it is, your Honor.

THE COURT: That's what your adversary says. Why is he wrong? What's the sense of making a lease with all this in?

MR. BUTLER: It was not the type of statement that would be included in the lease, the statement as to the level of occupancy, and it is a factor which you would not know yourself because they have all the information relative to that. That's a factor which they know about. The level of occupancy is not normally the term of a lease. The level of occupancy vis-a-vis you and the landlord is not a matter of primary concern. The matter of concern getween you and the landlord is what is the landlord going to give you for your dollars and what --

THE COURT: The level of occupancy certainly was a material point to this lease.

MR. BUTLER: It is a material fact and

why you walk in and go into the mall.

THE COURT: You can't have it both ways. One time you tell me it is not in the least because it is not important and in the next breath you say it is important because it affects the rent you pay under the formula.

MR. BUTLER: I didn't say it wasn't important. What I said was that vis-a-vis the landlord and yourself, the terms of the document,which is going to last for 15 years, are how much rent are you going to pya, how much are you going to pay for the water, what are you going to do under this condition, what are your rights to sue, how you are going to handle this procedure, what are the insurance provisions. These are the nuts and bolts of what you are going to pay. It has nothing to do with the conditions in the outside surroundings and the conditions in which the transaction is effected.

If no representation is made by a person to induce a lease -- if every single one of those has to be included, then the lease and the merger clause -- there is nothing more than a shield to protect landlords and permit them to perpetrate any fraud upon anyone because maybe --

THE COURT: What case do you have that says this survives the lease? What about the case photostated in the defendants' brief?

MR. BUTLER: The Schofeld case, your Honor. I have that here. That motion --

THE COURT: Was for summary judgment.

MR. BUTLER: No, it wasn't, your Honor.

MR. BERGEN: Preliminary injunction.

MR. BUTLER: We had moved for a preliminary injunction and that was August of 1975, when we made that motion. At that time we did not have discovery. It was only in January of this year that we received --

THE COURT: I am talking about the principle of law. The judge threw you out because you signed a lease.

MR. BUTLER: No, no, no, no, no. The decision was that we didn't show it at that point in order to get a preliminary injunction, that it had to go to trial.

THE COURT: Do you have any case that shows these fraudulent representations, which you claim were made, survive this lease which was made at arm's length? You have got one dealing with the parol

evidence rule.

MR. BUTLER: The parol evidence rule is a substantive rule. The idea is to let it in for the purpose of establishing that the contract was fraudulently induced. The parol evidence rule is more than procedure, that's the rule. If you were defrauded, that fraud vitiates the written document.

THE COURT: All right, I have got your point.

MR. BUTLER: I think we have covered A and B with regard to the facts as to occupancy.

THE COURT: No, youhaven't covered A at all.

MR. BUTLER: A was that all the rental space in the mall would be leased. We went to the 90 per cent --

THE COURT: Where is the representation of all of it? I don't recall one shred of evidence of any representation that all of the rental space in the Staten Island Mall would be leased. I don't recall any such evidence.

MR. BUTLER: I agree with your Honor. What was said was they have reached the 90 per cent

level, that it was almost all leased.

THE COURT: You agree that representation A was not made.

MR. BUTLER: I would agree that certainly we have not established that all.

THE COURT: You haven't established representation A, so that's out.

MR. BUTLER: I believe we established B.

THE COURT: Well, you say you have.

MR. BUTLER: And that B was buttressed by the --

THE COURT: Assuming that this was false, that it was knowingly false on B -- you have five things to show me: That a false statement on a material fact was made, that it was knowingly made, that you relied on it, and that you suffered damages.

MR. BUTLER: At the time the statement was made, if you recall from the testimony of John Feist, he testified they were having leasing committee meetings almost on a regular basis, almost every three weeks. At the end of those meetings this report, only one of which I have, the one for 9/14 -- this is September 14, 1972, and this is the only one I have --

THE COURT: Exhibit what?

MR. BUTLER: Exhibit 6-- showed 14 per cent occupancy. This is in September. This is after the August statement is made.

Now, Mr. Feist also testified that he did receive these reports. These reports were made at the end of each meeting as to what actually was leased. The meetings were held very frequently, every three or four weeks, and reports were made. So in August they certainly knew what was leased.

Also, there was a brochure which they were using to lease the premises. In November again they knew exactly how much space they had leased and at that time we have the exhibit here. In November they had 25 per cent full. So at 25 per cent full, they are still proclaiming that they have over 50 per cent, and the document -- it said that Feist & Feist said they had surpassed the 50 per cent mark. That's what the document says. That's what the advertising circular said.

Now, John Feist knew, or should have known at the very least from the reports which he was getting after each meeting --

THE COURT: They should have known it

was fraud?

MR. BUTLER: They should have known enough to establish fraud, yes. I think should have known is enough to establish fraud.

THE COURT: You don't allege that. You don't allege any negligent standards. You are saying intention to deceive or fraud.

MR. BUTLER: This information was in the possession of Feist & Feist. This information was prepared by Feist & Feist. Feist & Feist, Blackfriars and Tottenham.

THE COURT: You mean he is chargeable with knowledge, is that what your point is?

MR. BUTLER: It's the same person in all three. The Staten Island Mall is chargeable with the knowledge of the people who are preparing the information. John Feist had it.

THE COURT: Assuming you impute knowledge to him, how do you show he intended to deceive?

MR. BUTLER: The intent is drawn, your Honor, from the fact of publishing a document when you know that the information is false.

Now to declare in August --

THE COURT: Why is it an element of the

tort of deceived, a separate element that the same thing is knowledge? I have never understood intent and knowledge to be exactly the same. Intent is to deceive, to cheat you, to defraud you. How do you do that? Show that he did it deliberately, purposefully, with scienter?

MR. BUTLER: Yes. I think that that is drawn also from the other facts which were shown here, that you did have a very low percentage of a mall which was about to open and it was desirous to get that place full, and here is a man who was publishing a document known to be false for the purpose of attracting people to lease space at the mall. That was the purpose. It was a sales tool. It was used by them as a sales tool containing information which they believed would induce someone to come in.

Now, they knew it was fraud. I mean not fraud, they knew it was wrong, and I say that when you knowingly make a statement,which you know is important -- occupancy is a material fact -- when you say that the occupancy is high, over 50 per cent in August, and you know that that is a matterial fact, because if you are full or half full or over half full in August and you are not scheduled to open until

March, boy, by the time March comes you are going to be almost done, so that was an important factor for them to state, it was a material fact, and I believe that when you knowingly state a material fact incorrectly, misstate it for the purpose of inducing someone to act, I say you have intent, intent to defraud.

THE COURT: All right, proceed.

MR. BUTLER: I'd say that with regard to this item, as far as suffering damages, injury, that the mall for the first year was never more than about 60 per cent full.

THE COURT: But they said it's 50 per cent. If it is 60 per cent how are you damaged?

MR. BUTLER: The timing is what is important, your Honor. If you say something is 50 per cent full, we syrpassed the 50 per cent mark, and then someone comes in and they say, well, we are at the 90 per cent level, that makes sense to the average person. If you are over 50 per cent before the mall is opened, six months before, eight months before it is open, why, when you are three months from where you are opening and someone says 90, you know you are going into what's going to be a successful center. You want to be there.

THE COURT: What you hope will be.

MR. BUTLER: Well, it will have all the ingredients. What you hope is going to have all the ingredients of a successful center.

THE COURT: Suppose there were factors beyond the control of anybody, such as an economic slump. The occupancy level reaches only 60 per cent. How are you damaged, proximately damaged, by the misrepresentation that it was 50 per cent?

MR. BUTLER: In two ways, your Honor. First is that we would not have gone into the lease, that's No. 1, if we had known what the true state of facts was, so what we are talking about is that we believe there was a 90 per cent rate.

Now, if we knew in December there was just 30 per cent, 40 per cent, we wuldn't have gone in there. Thats' where the materiality comes in.

The fact that it is 60 per cent full is a fact that we would not have gone in there at all, No. 1. And No. 2 is that because there is only 60 per cent, the chances of it becoming a successful mall are very slight. The amount of expense which we would have to pay -- we would have to pick up more common-area costs, more taxes, there is more traffic,

less customers, fewer mobility in there as a result of it. The mall is not a successful venture from the point of view that it is not a successful business enterprise.

THE COURT: You are saying that the progression which you would expect would be substantially algered because of this figure.

MR. BUTLER: No doubt about it, your Honor.

THE COURT: All right.

MR. BUTLER: Now, with regard to the $1 -- and I think that while some of these statements -- we are taking out like the first one, which you say we didn't establish all of it; I think you still have to take all of this in the context --

THE COURT: No, we don't. Fraud must be alleged with specificity.

MR. BUTLER: Let's go to C. The tax rent would be approximately $1 per square foot per annum when the mall was fully operational and thereafter subject to normal taxes. I believe that we have testimony from Mr. Dale Kelly and Mr. John Kelly.

Mr. Dale Kelly has established from the meeting with Mr. Kirtland that he asked what the tax

would be. He was told it would be $1.25, 25 for the landlord and $1 for the tenant. He pursued that and said, "Well, is that a firm estimate and what is it based on?" They said based on their experience in the area. Fine, Okay. This is was Feist & Feist They are holding themselves out to the public and it is admitted that they were experts in this area

THE COURT: But they don't have a crystal ball. This is a patent estimate.

MR. BUTLER: It is an estimate. We have said from day one that this is not an estimate case.

THE COURT: But it is a patent estimate. What taxes are going to be, I could not conceive of anything that's more an expression of opinion or an estimate than that.

MR. BUTLER: Right. It was an estimate.

THE COURT: What's wrong with that?

MR. BUTLER: But, your Honor, the thing is you can arrive at reliable estimates and we believe that the estimate was made by an expert and it should be a reliable estimate. They gave us a figure --

THE COURT: That doesn't make a case. You

have to show a false statement of a material fact. Not somebody's opinion, not puffing, not some exaggeration. Where is the false statement of an existing material fact?

MR. BUTLER: The false statement is I estimate taxes to be $1. That is the false statement.

THE COURT: Why?

MR. BUTLER: Because they knew, they had information in their possession and they were informed and advised that their best estimate was not $1 but well over $2 a square foot.

THE COURT: You say it's a dishonest estimate?

MR. BUTLER: A dishonest estimate.

THE COURT: Knowingly.

MR. BUTLER: Knowingly made. Don Faughnan --

THE COURT: I realize he was bombarded with estimates that were higher, but does that make his statement false? He said he relied on the Korvettes thing. He was thinking about Korvettes. There is no evidence that he wasn't. We had some evidence in this morning. You promised to do the arithmetic and failed to do what you promised, but I won't sue for fraud.

What does it work out to, the Korvettes price?

MR. BUTLER: The assessment was 6.8 million and that's to be compared with the 19 million assessment of ours.

THE COURT: Foot by foot what is it?

MR. BUTLER: Theirs works out to over 500,000 square feet, so what you have to do --

THE COURT: I know what you have to do but I am not going to do it. I am asking you to do it. It would work out to more than a dollar a foot.

MR. BUTLER: You would have to triple the assessment. It's the assessments you have to compare. When you tripled it it worked out to almost the same thing. It worked out to three times 80 os 2.40, it worked out perfectly. What they didn't do was they didn't triple the assessment.

In other words, the assessment at Korvettes was 6.5 million. Nowk the assessment at the mall was $19 million. So if you are paying 80 cents in taxes per square foot at Korvettes, then you would have to triple the taxes because you have a triple assessments, so your estimate of taxes for the mall would be 2.40, and that's the way it worked out.

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THE COURT: 2.40 a square foot.

MR. BUTLER: 2.40 a square foot.

We have two people who were informed constantly, Irving Feist and John Feist. They were informed as early as August by Don Faughnan of the taxes, and in that document he estimates taxes at $2. He informed them of that. He told them this may not be economically feasible to the tenants who were coming in here to bear such a cost in connection with the other costs whch we will get to later, the common-area aspects. They knew that. Nonetheless Mr. Feist, John Feist, did not tell the salesmen anything other than the original gesstimate which he made about Korvettes some time in 1970.

I think that he had a duty, knowing, which he conceded, that tenants would ask about information regarding taxes, and it is also agreed in there, that it is also testified, that they would rely on it, and he has also testified, or it has been stipulated, that this was a matter of concern to a tenant, that they would ask about this and there was no way of getting that figure because all the information about that figure was in their possession. No one else knew what the building was going to cost. No one else knew

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2 what kind of parcels were involved in it. He had

3 all the information and he knew that some tenant over

4 there was going to ask about that information and he

5 knew that the person who was going to give the answer

6 was going to give a wrong answer, and I say, your Honor,

7 that that is intent to deceive.

8 THE COURT: I am going to suspend the

9 argument here. After a while the mind runs out.

10 I would like you to be on tap to resume

11 at any time tomorrow. I have a criminal case scheduled.

12 Whether we will go through, I don't know, and I have

13 a hearing scheduled now which may determine whether

14 it does or does not.

15 In any event, I would hear you, to resume

16 at 4:30 tomorrow afternoon, if I don't call you earlier

17 in the day. All right.

18 MR. BUTLER: Thank you, your Honor.

19 MR. BERGEN: Thank you, your Honor.

20 THE COURT: We will recess.

21 (Adjourned to March 24, 1976.)

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MAGNALEASING, INC.,

vs. 74 Civ. 5593

STATEN ISLAND MALL, et al.

New York, March 24, 1976;
10.00 o'clock a.m.

(Trial resumed.)

- -

MR. BUTLER: Your Honor, if I may, in my discussion this morning I am going to use these exhibits in this order, and I thought it might be helpful to the Court to pass them up at this time (handing).

THE COURT: Thank you.

MR. BUTLER: Before I begin, your Honor, I would like to delete Paragraph 10(e) -- that is the statement which says that all tenants who are on an equal proportionate basis --

THE COURT: You are abandoning that?

MR. BUTLER: Yes.

THE COURT: All right.

MR. BUTLER: So we left off yesterday --

THE COURT: Then we are left here with three alleged misrepresentations.

MR. BUTLER: Occupancy, 60 cents for common area, and a dollar for taxes.

THE COURT: All right.

MR. BUTLER: We were talking about taxes yesterday when we left off. The representation of a dollar was made at the meeting by George Kirtland to Dale Kelly, John Kelly and Daryl Laxson. Mr. Kelly showed his notes, contemporaneous notes of his having used that figure. There has been no denial that the representation of a dollar for estimated taxes was made.

John Feist testified that he told the sales people that the estimate for taxes would be a dollar to $1.25, with the landlord paying the first 25 cents.

He knew, he testified, that prospective tenants would ask for the estimated taxes. He knew the sales people were providing estimates. He knew that he provided estimates, but he never provided any estimate other than one dollar.

Moreover, he testified that he knew that the tenants would rely on the information regarding the estimates which he had provided. We state that the representation was untrue at the time it was made.

Don Faughnan, the comptroller of Feist & Feist, testified that he had prepared a memo, Plaintiff's Exhibit

No. 9, where he flagged in no uncertain terms that there was a problem with high costs over and above the basic rent, including taxes.

THE COURT: Is that memo dated before the meeting?

MR. BUTLER: It is dated August 2, 1972. Mr. Faughnan testified --

THE COURT: Was that before or after? That is all I am asking.

MR. BUTLER: That is before.

THE COURT: It was before.

MR. BUTLER: The meeting was December 4.

THE COURT: But this is from August to December.

MR. BUTLER: Yes.

THE COURT: It has quite a gap of time in there.

MR. BUTLER: We will bring it up to date.

THE COURT: All right. Then you say that the statement is false.

MR. BUTLER: In December -- excuse me, in August, Mr. Faughnan told both Irving Feist and John Feist that taxes were going to come in at approximately $2. He had an estimate -- and I show your Honor Plaintiff's Exhibit No. 9. On the first page it stated that real estate taxes, $2.15, to deduct from that 25 cents for the

landlord, $1.90.

He also took Plaintiff's Exhibit 18, another memo prepared by him, by Don Faughnan, and he said -- and from this document, looking at both of these you can tell, you can determine that taxes would be $1.90.

In addition to that he said that because these costs reflected the common area charges and taxes were so high, that he called it to their attention because he told them at that time "I think we should ask ourselves whether it is economically feasible for the tenants to carry such a high cost" -- and he testified that he told them.

Now after that date, your Honor, we have the next document which comes along on taxes, which is the December 15th memo -- I think that is out of order -- I believe it is the October 15th report. The October 15th report, Plaintiff's Exhibit No. 10, with a copy to John Feist, sent to Irving Feist, has in it an estimate of taxes, on page 4, and also on the last page, page 5.

The estimate for taxes in October, at that time, was $1.90 -- a jump from $1.90 to $2.27, an increase of 43 cents. That was contained in October, your Honor. This is the information which Irving Feist and John Feist had in their possession.

In December -- on December 15, some time before

that, because Mr. John Feist's memo states;

"I spoke to Ed Fraher the other" -- and we identified Ed Fraher also as one of the other persons preparing financial information -- "and he said, 'Ed Fraher told me the other day that the figure of tenant's share of taxes on the Staten Island Mall for the opening year' -- and that is the key word, 'opening year' -- 'was to be 2.34 a square foot.'"

Now this memo was a confidential memo. It was not to go to anyone else other than to Irving Feist, with a copy to John Feist.

(Continued on next page.)

2 The testimony is that it didn't go to any-
3 one else and that the information contained in this memo
4 did not go to anyone else.
5 The next occasion we had is the January
6 document, another set of financials.
7 THE COURT: Now, this is after the meet-
8 ing?
9 MR. BUTLER: This is after the meeting
10 but prior to the lease.
11 THE COURT: All right.
12 MR. BUTLER: This is a very telling docu-
13 ment, your Honor, because if you recall therepresenta-
14 tions were authorized right up until the opening of
15 the mall on August 8th. Mr. Feist testified he
16 never gave them any other information and he knew
17 that up until that point that his sales people were
18 using that information. This document shows two things.
19 It shows that they were estimating income to be received
20 from the tenants at 2.42 per square foot, but more
21 importantly -- and let me see -- this is going to be
22 a bit difficult and I hope you stay with me on this
23 one, because this shows the magnitude of the fraud. This
24 is the October 2nd memo. On the third page it shows
25 that they were anticipating income, that's what this is,

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estimated income, tax rent, of $2.42 per square foot.

Now, if you recall, just going back a bit, we had Ed Fraher's memo, which said 2.34, and we had the October statement, which was, as I said before, about 2.30, so the estimates are coming in now. 1.90, about 2.30, 2.34, and now they are counting on income and they have it down now to 2.42. It's just slight adjustments being made.

Now, this is for the opening year, the eear in which the premises were to be assessed without the mall. Okay?

Now, if you look at the last three pages of this document -- the first of the last three pages is the document that we found in August. That's the August estimate which works out to approximately $1.90. The second one is the copy of the October statement. The third one is a copy of what the estimate is going to be when the mall is fully completed. And, your Honor, that works out to $4.55.

If we go back to the beginning, the representation was that the dollar per square foot was for a completed mall.

THE COURT: No, your complaint says when the mall was fully operational. That's what you

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allege.

MR. BUTLER: Well, your Honor, I would make a motion to confirm the pleading to the proof, that at the time we drafted the complaint we believed that a fully operational mall was a fully completed operational mall.

THE COURT: The proof is in now. It's a little late to start amending complaints in a fraud case when the representation is that it is fully operational.

MR. BUTLER: Fully operational, your Honor --

THE COURT: And that seems to me to be open to quite a lot of debate in ambiguity as to what you mean.

Now, there is no representation here and I don't recall any evidence that says when the mall is fully completed.

MR. BUTLER: The question was asked, and not denied, whether it was to be assessed on a fully-completed basis, and the answer to that was yes.

THE COURT: Even that is open to questio.

MR. BUTLER: Well, we are talking about complete for the purposes of assessment. Let me just

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point out, your Honor --

THE COURT: I think you are talking about completed in terms of your proportionate share of the rent, of the taxes, and it makes a substantial difference, as you yourself have pointed out any number of times in this trial, whether the mall is half rented or 60 per cent rented or 100 per cent rented.

MR. BUTLER: We are talking about --

THE COURT: Here is a term -- I don't know what it means.

MR. BUTLER: Just going back to the document then and without drawing a conclusion from it, in October -- in January they were counting on income of at least $2.41 from the tenants per square foot. They had estimates of taxes going down to the next subsequent year at which they knew at that time the taxes would come in around 4.55.

THE COURT: When you say they were counting on income from the tenants, do you mean that would be their gross rental?

MR. BUTLER: No. The sheet reflects --

THE COURT: I don't know what you mean.

MR. BUTLER: Income from the tenant would be the tax income.

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THE COURT: All right, they were going to get 2.40-something.

MR. BUTLER: 2.42 in taxes from the tenant.

THE COURT: All right.

MR. BUTLER: To show the accuracy of that estimate which is on Plaintiff's Exhibit No. 14, when the first bill came out, the August 6th statement, that was $2.45.

THE COURT: Let me ask you, Mr. Butler: on the assumption that the representation meant full occupancy of the mall, how does that figure work out?

MR. BUTLER: How does the figure work out?

THE COURT: $1.

MR. BUTLER: This is what it is, your Honor.

THE COURT: If it were fully rented would it work out to 2.42?

MR. BUTLER: Yes, your Honor, this is based on fully rented. We are not using other figures.

THE COURT: I see. So even if we stick with your allegation of fully operational and take that

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to mean full occupancy, nevertheless, there was a misrepresentation?

MR. BUTLER: Yes. Because they knew at the time this was being negotiated that the first year was a partial assessment, that when the job was finished and the mall was running and you were in there for good, that the starting year the taxes were going to be $4.55 a square foot, and, your Honor, they came in at, as the testimony shows, 4.95 a square foot. In 1974 and 1975 the taxes were that.

THE COURT: When you say that, you mean the tenants' share?

MR. BUTLER: Yes. If you recall, he testified, as reflected on the last page, that what went into the tenants' share on taxes is the mall, the land for mall 2, the land for mall 3, and a parcel in the northwest corner, and the lease provided that they had the option to throw in this land.

They knew in January of '73 that when the project was completed, that their estimate of what the the taxes would be on a square-foot basis was $4.55 and the taxes came in at $4.95.

So you have two different years here you are talking about. The first year when the mall

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is just opening --

THE COURT: But the mall was never fully operational, never fully rented, was it?

MR. BUTLER: The mall is operational in the sense --

THE COURT: In the sense that I am talking about. Let's not try to confuse it?

MR. BUTLER: It was never fully rented.

THE COURT: It was never fully rented and therefore your proportionate share of the taxes would be higher.

MR. BUTLER: Right.

THE COURT: Where is the fraud?

MR. BUTLER: What we paid, your Honor, was higher than 4.95. We were told that taxes were going to be $1.

THE COURT: If they fully rented.

MR. BUTLER: $1 a square foot was the estimate of taxes for us. Twenty-five cents for the landlord, $1 for us. That was the representation.

THE COURT: No, the representation you allege is when the mall is fully operational that will be your taxes.

MR. BUTLER: When the mall opens up and

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the mall --

THE COURT: When the mall is fully rented.

MR. BUTLER: No, no, no, your Honor. It doesn't say fully rented.

THE COURT: What does proportionate share mean unless it means a proportion of a fully-rented mall? It certainly doesn't mean a proportion of a mall that's opened up.

MR. BUTLER: A mall is operational when the doors are opened, when the lights are there, the air conditioning is there, the place is running. The testimony is that this was the going-in figure. When you open that door on August 8th, and that was the grand opening, that mall is operational. Whether or not --

THE COURT: There would be no point in providing for a proportion if that were the case.

MR. BUTLER: The proportion is that each person, each tenant, bears his share of the cost.

THE COURT: When it is fully operational. When the thing is fully rented, full blast. That's what it means to me.

MR. BUTLER: Your Honor, the testimony is that when the mall was completed the taxes would

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be $1. The mall opened and the taxes were over $1.

THE COURT: That's some of the testimony. There is certainly conflicting testimony.

MR. BUTLER: Your Honor, there is no conflicting testimony about the representation having been made, nor is there any conflicting testimony that it was to be when the mall was --

THE COURT: Read me the part that backs up your version. If you have got a transcript, read it.

First of all, there is no question, is there, is there any such written representation anywhere as to the allegation would seek? Is there any written representation to that effect?

MR. BUTLER: There is no written representation, your Honor.

THE COURT: All right, so give me the testimony of the oral representation.

MR. BUTLER: The oral representation --

THE COURT: Page and line from the testimony.

MR. BUTLER: Page 171, your Honor, John Kelly testifying, the last four lines, and he

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said, "Well, again it is based on our experience in this area."

I said, "Can the estimate vary?"

He says, "It could vary."

THE COURT: I'm sorry. What page?

MR. BUTLER: 171.

THE COURT: All right. What line?

MR. BUTLER: Going down to, say, line 22.

THE COURT: All right.

MR. BUTLER: The completed mall fully assessed is the completed mall and real estate people know a completed mall would be a completed building.

THE COURT: All right.

MR. BUTLER: Now, we knew, of course, that we had to pay our proportionate share and that goes back to the importance of the occupancy, because we were led to believe at that point that over 90 per cent had been reached, 50 per cent definitely stated, 90 stated at the meeting, and that hasn't been refuted. We felt there was no problem in that area.

But going back --

THE COURT: What did your proportionate share mean?

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MR. BUTLER: Proportionate meant that we, as other tenants, would pay our proportionate share of the common-area charges. In other words, each person enclosed in this mall, each store, and what they have in common is they have this strip and out there have games and passageways and parking facilities,and all the tenants pay their proportionate share of those costs. There is no problem there.

THE COURT: On the assumption that it is only 50 per cent occupied, that proportionate share would be double what it would otherwise be.

MR. BUTLER: Yes, your Honor. That's correct.

2 THE COURT: Doesn't this representation, even
3 crediting Dale Kelly's testimony when the mall is fully
4 completed, that your share, your proportionate share would
5 be one dollar -- did you take that to mean whether or not
6 the rest of the stores were rented? Suppose you were
7 the only tenant.
8 MR. BUTLER: If we were the only tenant, your
9 Honor, we would pay the entire tax -- the entire tax or the
10 entire common area charge. That was the importance of
11 the representation that it was almost 90 per cent full.
12 He could go in and everybody pays their proportionate share
13 of the taxes -- that was the significance, the tremendous
14 significance of the early August representations about
15 occupancy, to create that smooth flow going to develop an
16 idea that "We have a fully successful situation here" --
17 because of that very concept, that since the tenants are
18 the ones who go in there and have to share the expenses
19 among themselves, both the real estate taxes and the
20 common area taxes, that the occupancy is such an important
21 factor.
22 THE COURT: What you want to do, it seems to
23 me, is to have it both ways. You argue, and the testimony
24 of Dale Kelly is to the effect that when the mall was fully
25 completed your share of the taxes are going to be a dollar,

but you say that is not what you understood. You understood that your share was going to be a proportion of the total taxes on the mall, determined by -- the proportion being determined by the level of occupancy-- right?

MR. BUTLER: No, what we are saying, your Honor, if I may, is that we are going in, we have a mall, and they are saying --

THE COURT: Well you never understood that your proportion was to be in proportion to the square footage you rented or to the square footage of the total mall, did you? Is that what you understood?

MR. BUTLER: The proportion which we rent --

THE COURT: To the total.

MR. BUTLER: To the 420,000 square feet.

THE COURT: Yes, that would be your share.

MR. BUTLER: That would be our share.

THE COURT: Whether or not the rest of the buildings were rented.

MR. BUTLER: Whether the rest of the buildings were rented, sure. That is the importance of the occupancy representation.

THE COURT: What does occupancy have to do with it? Whether or not they rented another single store, you say your share was to be a dollar.

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MR. BUTLER: No, no, no. I say that our proportion -- if they did not rent another store we would have to pay the whole tax.

Let us make it clear so that you and I, your Honor, are on the same track.

THE COURT: What does whether it is fully completed have to do with it? You are saying that you understood that when the mall was fully completed --

MR. BUTLER: Built -- the building.

THE COURT: The building -- that is what I am talking about.

MR. BUTLER: And placed on the assessment rolls.

THE COURT: All right, and assessed.

MR. BUTLER: Okay.

THE COURT: That your share is going to be a dollar?

MR. BUTLER: Right.

THE COURT: Whether or not anything else is occupied.

MR. BUTLER: No, no, no, we are not saying that, your Honor. We are not saying that at all. We are saying that the representation was when the mall is fully completed, on the assessment rolls -- that is what it says -- fully assessed, building -- "our estimate" -- the

landlord's estimate that taxes would be one dollar a square foot based on 420,000 square feet -- right?

Now we came along --

THE COURT: And the proportion --

MR. BUTLER: And our proportionate share would have been one dollar if all 420,000 square feet were rented. If there was something less than that rented, we would, of course, pay a little bit more. Our taxes would fluctuate, go up with the occupancy level.

THE COURT: All right, go on. We are still at sea, though.

MR. BUTLER: We are still at sea.

THE COURT: Why aren't these just estimates, opinions, predictions?

MR. BUTLER: They are estimates, your Honor. They are estimates made at a time when they have information. They are experts; they have special knowledge.

THE COURT: There has been no assessment.

MR. BUTLER: Yes, there was.

THE COURT: The mall isn't complete at this time.

MR. BUTLER: There was an assessment on an incompleted mall -- the land; you have the cost of your land, you have all your improvements. So that was a

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figure which you could ascertain.

The second thing which you are talking about is a fully completed mall. Okay. And as the testimony showed, Mr. Feist -- we went down with him -- that is what you take, you take your building and the cost of your construction, and you have your contracts for that, you have the cost of your land, you have the cost of your improvements. That gives you the total value of the land plus improvements.

THE COURT: That is the land as you value it. The assessor may have a totally different idea -- he frequently does, and that is why you have certiorari proceedings.

MR. BUTLER: That is true, your Honor, but these people are experts. They represented themselves as experts in the area.

THE COURT: Yes, but you were certainly experts as well, and you knew that the City of New York could disagree totally with any valuation that these people put on it or that you put on it.

MR. BUTLER: That is true, I have no argument with that, your Honor. The fact of the matter is, though -- and this is the important point -- that they were telling us "Our estimate is one dollar" when they knew

that their estimates, prepared by their experienced accounting people, were over $2 -- $2.50. They knew that this was important information. It is conceded --

THE COURT: You are saying it is a false statement, of a state of mind.

MR. BUTLER: It is a false statement, right. They knew that they were giving us something other than their true estimate.

THE COURT: Their estimate is contrary to what they themselves honestly believed.

MR. BUTLER: Honestly believed.

Now the intent to deceive -- I am sorry, if I may go back for just a second -- in the face of all the documents, the financial information, and the testimony of Don Faughnan was -- this was comulative; this was almost on a daily basis. He was talking to Mr. Feist, and I might point out in the transcript that Mr. Feist denies talkint to Don Faughnan -- if you can imagine that one -- Don Faughnan was the comptroller, the CPA. He said he kept Irving Feist informed, and in the face of all this Mr. Feist says he ignored it all, he ignored Ed Fraher's warning.

THE COURT: Well, supposing he did, he honestly did? Suppose I believe that he was just dogmatic, that

these figures were crazy; he is experienced, I would suppose he could make that kind of judgment.

MR. BUTLER: Your Honor, we take the Korvette situation -- that is what he pointed to, the 1970 assessment on Korvette. If he had done that right in 1970, he would have come up with the figure of $2.40 a square foot, which is almost exactly the same figure which this came to.

THE COURT: All right, so he makes a mistake.

MR. BUTLER: Your Honor, in the face of this information, when he knows and he is told, and he says himself "If we are going to have taxes like this we are certainly going to have problems with the tenants" -- he says that. He knows that there is something wrong.

THE COURT: But you are dealing here at arm's length. There is no fiduciary obligation of full disclosure.

MR. BUTLER: Your Honor, there is a duty placed upon Mr. Feist, who is a member of the Real Estate Board of the State of New York, which is Feist & Feist, to be fair in their dealings not only with their clients but with the public, and with people who negotiate with them. We have here --

THE COURT: It is a duty not to make any mis-

representations.

MR. BUTLER: We have here a situation where they have expertise --

THE COURT: And so do you.

MR. BUTLER: -- and special knowledge.

THE COURT: So do you. You have Kelly here -- he is a lawyer, John Kelly. He has had years of experience in the real estate business. He has rented stores in malls for chains and for your client. He is no babe in the woods; your client is no babe in the woods. Any of these figures about what Korvettes' taxes are are as available to you as they are to Feist. Any of these figures that are in public records are all available to you and presumably you are watching out for yourselves.

MR. BUTLER: Your Honor, we could not determine the figures, as we examined with Mr. Feist, that the information you would have to have to determine those figures was information which was in their possession. They had the sole and exclusive possession of the financial information required by us to make that determination.

THE COURT: They did not have the full and exclusive information about Korvettes, which is across the street or around the corner -- and substantially a retail store.

MR. BUTLER: Korvettes is on an open mall, it is not closed, and it is not --

THE COURT: The assessment on a retail market-place would give you, I think, probably a more firm basis for a prediction.

MR. BUTLER: Let us stop with that, because I think what you are saying is important. So we went over to Korvettes. Remember now the assessment there is 6.8 million. That is how you come up with the charge of 80 cents a square foot.

Now what we would have to know in order for us to make any reasonable comparison, we would have to know what was the value of the mall, so that they knew in their figures they had it down as 19 million, as their estimate of the assessment. Now that is the figure you have to have -- what is that building costing you.

THE COURT: Did you ask for that figure?

MR. BUTLER: We had asked what was the basis -- Mr. Kelly asked Mr. Kirtland what was the basis for that figure.

THE COURT: What did he say?

MR. BUTLER: And he said, "Our experience and our knowledge of the area."

THE COURT: Yes. Did he ask "What is the

value of the building?"

Kelly is an expert, too. If he is concerned with the value on this estimate, why didn't he ask?

MR. BUTLER: Your Honor, the testimony shows that the both Kellys thought the figure was a little bit high. They had no reason to believe that, asking that question and getting that answer, and they both testified that they were dealing with a reputable company, that they had no reason to go beyond that figure. It was a bit high to them -- okay. They finally accepted it as a little bit high, but they had no reason -- Feist & Feist held themselves out as being experts and held themselves out as being responsible. We are talking about what were supposed to be honorable people.

THE COURT: Yes, but you know they don't have a crystal ball.

MR. BUTLER: Your Honor, we are not talking about crystal balls; we are not talking estimates. What we are talking about is that Feist & Feist on the one hand had a $2.50 estimate, and we said, "What is your estimate?"

They said, "One dollar."

Your Honor, when I ask someone what his estimate is and he knows I am relying On it, because the testimony

is -- your Honor, at page 74 -- yes, I think it starts probably at the bottom of page 73, after "By Mr. Butler", and goes right on through line 12 on page 74.

Now, your Honor, he knew from his experience that this figure, when given to us, would be relied upon by us. That is admitted, and we did. He knew that. He knew he couldn't get the information -- that we didn't have it, that they had a special information, a special knowledge.

Now with regard to intent to deceive, I believe a person intends the consequences of his acts here.

If you go to the first memos, which we introduced, Plaintiff's Exhibit 9, Faughnan had highlighted the situation --

"There is a serious question as to the economic feasibility of this project for tenants."

In August they were only 19 per cent full -- leased.

In October, they were up to 30 per cent -- 25 to 30 per cent. They were in trouble, and they knew it, and they acknowledged it.

So therefore they did not want to tell anyone. They had confidential memos to themselves, but they did not disclose the information to the sales people, and they knew

that the sales people were being asked, and they knew that information the sales people were giving them -- knew, and Mr. Feist himself said, that they would rely on that information.

I say that they deliberately withheld that information from the sales people, and they did it for the purpose of inducing people to enter into these leases as fraudulent statements that -- and this is the fraudulent statement -- "Our estimate of taxes is one dollar."

THE COURT: All right, go on to the next.

MR. BUTLER: Reliance:

John Feist admits that we would rely on the figures. He said in his testimony -- and this was also stipulated, your Honor -- that the tax rent is an important factor -- stipulation No. 100 -- that that is an important consideration for a tenant.

Kelly obviously would not have entered into the lease if he knew the figures. The negotiations were very tight. He told them that at $7.50 -- that is, $7.50 and one dollar and sixty cents -- that is $8.10 -- that they couldn't afford it -- excuse me, $9.10 -- that they couldn't afford it.

He was able to negotiate it down to $6.50 and $1.60 or a total rent of $8.10 -- that that is something

that they could live with.

The taxes were a very important factor. The negotiations went from $10, which they could not take, and they told him that they could not afford it, and that is stipulated to -- it went down to $7.50 and he says, "I still cannot do it at $7.50."

They knew that dollars and cents were an important factor, there is no doubt about that.

Another important point here, Your Honor, is that the testimony is undisputed --

THE COURT: What are you addressing yourself to now? I am not following you.

MR. BUTLER: -- is that both Kellys told Kirtland that they were going to us the information, that they were going --

THE COURT: You are addressing yourself to the subject of reliance?

MR. BUTLER: Reliance, your Honor -- that they knew they were going to take this information and that they were going to use it, and that Dale Kelly said, Kirtland said, "You can use that figure. It is a good estimate, you can use this."

He told them that they were going to go out and get someone. He knew they were going to rely on it, and

I think the negotiations showed they were going to rely on it -- the close pricing shows that.

(Continued on next page.)

2 Now, with regard to the injury that we
3 have, as Mr. Faughnan states in his memo, we have an
4 economically unfeasible situation. We are obviously
5 paying more than what we bargained for.
6 THE COURT: Have you abandoned your damage
7 claim here? I don'r recall any evidence on damages
8 at all.
9 MR. BUTLER: No, we haven't. Your
10 Honor, the damages which we put in were we put on Mr.
11 Grenesko to show what the improvements were to the
12 store and the other was just the difference between
13 the price which is easily calculated.
14 Going, your Honor, now, to the common-
15 area charges, the representation with regard to common-
16 area charges contained also in the lease, where it is
17 stated that the landlord's estimate of tenants' propor-
18 tionate share of common-area charges shall be 60 cents
19 per annul per square foot, this was for the initial
20 period which they were using, and that period was August
21 9th for the opening up to about April 15th.
22 The representation was not only contained
23 in the lease, but the representation was also made
24 at the meeting. It was made at the meeting on Decem-
25 ber 4th, attended by Dale Kelly, John Kelly, Darryl

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Laxson. John Kelly made notes of it, used that figure in his notes, used that figure in his computations, and I don't believe there has been any denial that any such representation had been made at that time.

John Feist has testified that he gave that figure to the sales people. That's where that figure came from. And he knew that they would use it, that it was important to the tenants. It was an important consideration. That was stipulated to. He knew the tenants would ask for it and he knew they would rely on it. We state that that representation that the common-area charges -- that their estimate -- it says landlord's estimate -- that that representation, that statement, landlord's estimate of common-area charges of 60 cents --

THE COURT: For the initial period.

MR. BUTLER: Per square foot. The initial period, after which we would expect your normal increases. You go in and you have a figure, you start off with it and then everything changes.

THE COURT: Where is the representation that increases are going to be normal, whatever that means?

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MR. BUTLER: The conversations with Mr. Kelly --

THE COURT: First of all, there was no false representation, was there, as to the fact of 60 cents during the initial period, stopping at that point.

MR. BUTLER: That was a false represena-tion.

THE COURT: Why?

MR. BUTLER: Because that estimate was untrue.

THE COURT: Weren't they 60 cents during the initial period?

MR. BUTLER: No, they were not, your Honor. They were not 60 cents. They were billed at it and, as you recall, Mr. Kelly stated they were back-billed for that whole period.

THE COURT: At 60 cents?

MR. BUTLER: $2.58 for common-area charges.

THE COURT: But they were intially billed at 60 cents?

MR. BUTLER: They sent him a bill --

THE COURT: Did you pay it?

MR. BUTLER: Yes. That's why -- if

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we just go back a second, do you remember when we were talking about April 15, 1974 yesterday?

THE COURT: I don't follow you. Pull the evidence together on why that representation was false.

MR. BUTLER: The representation that the landlord's estimate would be 60 cent was untrue.

THE COURT: Sixty cents for the initial period is what you allege.

MR. BUTLER: The representation was that for the initial period per annum, going into the mall for a period of time, nine months, ten months, we would be operating at 60 cents, and thereafter the normal increases would take place, which everyone encounters. We are not saying that any price was to be fixed forever, but going in you could look to and expect to pay approximately 60 cents. Here in this case 60 cents a square foot, and with inflation, or whatever the case might be, it might go up 5 per cent, 10 per cent, 15 per cent, whatever the case might be.

THE COURT: Well, it might go up 100 per cent.

MR. BUTLER: It might go up 100 per cent.

THE COURT: 200 per cent.

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MR. BUTLER: Or 200 per cent, that's correct. But at the time they made that estimate, at the time they made that statement, they knew, and it is not denied anywhere, that they had in their hands detailed information that their estimate for common-area charges for that period was well over $2. They knew that.

THE COURT: But didn't they fix it at 60 cents in the lease?

MR. BUTLER: Their estimate. No, they did not fix it at 60 cents.

THE COURT: For the initial period.

MR. BUTLER: No.

THE COURT: Does the lease fix it at that cost?

MR. BUTLER: No, it does not fix it.

THE COURT: Read the lease clause.

MR. BUTLER: For the purpose of the period from the commencement date to the date the landlord furnishes the first statement of tenants, landlord's estimate of the tenants' proportionate share of common-area charges shall be 60 cents per annum per square foot of floor space in the demised premises. That's all. If it is more than that, you will be

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2 adjusted and that's what they did.

3 So the testimony -- just to stay with that

4 one second -- is, Kelly testified that it was December

5 the following year, in 1974, when they got the back

6 bill for that first nine-month period.

7 THE COURT: All right, I am with you.

8 MR. BUTLER: Now, Don Faughnan, told

9 Mr. Feist again in this memo, highlighting the diffi-

10 cult problem, the economic unfeasibility of it, and

11 in this memo, Plaintiff's Exhibit 9, which went to John

12 Feist, the common-area charges are set out with clarity.

13 You don't have to do for this what I have been trying

14 to do for the court of adding and subtracting and

15 multiplying square feet; it's here it's plain and simple,

16 the next page after the cover page: $1.22 for ser-

17 vices, $1.22 per square foot for services, 15 cents

18 a square foot for repairs, 6 cents for insurance, utili-

19 ties $1.41, a portion of that goes to common area.

20 It was here, your Honor, clear and con-

21 cise, and because it was clear and concise and because

22 of the figures,Mr. Faughnan wrote to him, spoke to

23 him, gave him a figure. Mr. Faughnan said, "I told

24 him that common-area charges would be over $2, around

25 $2.20," and this memo --

THE COURT: What exhibit is that?

MR. BUTLER: This is Plaintiff's Exhibit 9. It has it set out clearly.

Now, I might say here that we don't have any testimony that Mr. John Feist said he was comparing this with Korvettes. There is no testimony, none at all, as to why these figures were rejected. The same information is contained in the August 24th memo -- no, the August 14th memo, which is Plaintiff's Exhibit 18. The October 10th document, which is copied to Mr. Feist, Plaintiff's Exhibit 10, on this one now we have common-area charges at $2.27. Again the common-area charges are set out very, very clearly. Also, it is estimated income. This was income which it had estimated was going to come from the tenants.

In January, on Exhibit 13, we have Mr. Feist's handwriting. He said that that's his handwriting. He denied ever receiving the document, but he did say that he did put his handwriting on it. On this is a cash flow statement of common-area charges. We worked it out with him and we came up -- and this was placed in January of 1973 -- we worked this out with him to be $2.86 a square foot as an estimate. This was information, hard-core information, which

they had in their possession.

The next one which he had in his possession is even more hard core. Again Mr. Feist's handwriting --

THE COURT: What are we talking about?

MR. BUTLER: We are talking about a January memorandum.

THE COURT: January what?

MR. BUTLER: Placed around January, 1973.

THE COURT: Doesn't it have an exhibit number?

MR. BUTLER: Yes. I am trying to get that for, your Honor. It is 17, your Honor.

Now, Plaintiff's Exhibit 17, the last three pages, that's detailed information. It talks about the porters, the shifts, the relief of porters. It talks about the supervisors, how many hours they are going to spend, the midnights, the days they are going to work, talking about cars, Easter vacations, Christmas vacations, and you get down to the end and these figures do not include utilities or insurance or management fee or anything, we are just talking about some of the basic services. The figure is

$856,000. I am just rounding it off.

Now, 420,000 square feet and 8.56, no matter how you do it, is over $2. Now, this was information which he had, detailed information which he had initialed, in his hands and knew that it was important, important to tenants, and he knew that the information could not be obtained by the prospective tenants, by Magnavox, by Magnaleasing, they knew that. This was information solely within their position, the preparation of services and budgets and information as to what the mall was going to require in terms of utilities, insurance, police protection, cleaning, everything. It was information which they had and they knew that their figures were not what they were saying, so when we said, "What's your estimate of common-area charges?" and they said, "60 cents," they knew that their estimate wasn't 60 cents, their estimate was over $2 and they knew that.

I point also to Plaintiff's Exhibit No. 11, December 15th, where John says, "If we are going to have taxes like this" -- that's the 2.34 -- "in addition to the common-area and everything else, we are certainly going to have problems with our tenants." Indeed he knew that they were going to have problems.

He also knew, as the January memo indicate -- and I think this is also important for that point -- the comment from Faughnan, "The obvious problem here is lack of tenants." That was the problem with the mall: lack of tenants. Economically unfeasible. Those are the terms, you see.

John Feist, knowing that if these figures ever got out we are going to have a problem, so let's get everybody in. Now, don't tell them. Tell them our estimate is 60 cents and tell them our estimate is $1. They will never find out. Let's get them in here and sign them up. Maybe it might work out, who knows, but don't tell them the truth, God forbid, because he knew that no tenant in his right mind on December 4, 1972 would go into a lease if he knew that common-area charges were going to be over $2 and taxes were going to be over $2 and the mall was only about 35 per cent full at that point in time, no one. Certainly not Magnavox for the purpose of setting up a home entertainment center, which is a small business run by a small man who has to make a buck, and there is no way that that person could ever survive and they knew that.

We asked them for that information. They

1 knew we were taking it and relying on it, and Feist
2 knew we were relying on it, but he didn't want to tell
3 anybody. He said so in that confidential memo for
4 Irving's eyes. Maybe John is being kicked around,
5 but Irving knewtoo. Irving was the president and
6 he knew what the financial information was, but he didn't
7 do anything and you didn't see him here and John
8 couldn't get out of the courtroom fast enough. And
9 you haven't seen Kirtland here either.
10 I will say the intent is that they were
11 experts and they said and they held themselves out to
12 be experts in managing malls. Since they
13 were experts in managing malls and they said they
14 operated other malls, managed other malls, there was
15 no reason to believe that their figures which they
16 had were not what they were saying they were, and they
17 knew that they weren't.
18 I say or suggest, and I would urge the court,
19 that the failure to tell the truth in response to an
20 inquiry is intent to deceive.
21 With regard to reliance on the representa-
22 tion with respect to common-area charges, they knew, as
23 they admitted, that we were going to rely on it.
24 John Feist said that. They knew we were going
25

to sue the information. Our negotiations showed thaw cost was an important factor. If we knew that we were going to pay $2 ror common-area charges, just to stay with the common-area charges, $2 for the common-area charges and 6.50 rent, would be much larger than we wanted to go. We had rejected an offer which would have come to the same amount. We would not take that figure. That was established, that we had rejected that .

With respect to the injury, the injury, I believe, is apparent, that we were paying far more, 2.58 a square foot going in, than we ever expected to pay.

Now, if I may address myself to the defenses --

THE COURT: First of all, here you have got five or six causes of action, I don't remember what.

MR. BUTLER: The second, as I stated, is out.

THE COURT: The second cause you have dropped, all right.

What about the third?

MR. BUTLER: I think that --

THE COURT: How do these differ, is what I am trying to find out?

MR. BUTLER: The third cause of action is a cause of action for mistake.

THE COURT: Do you claim there was a mistake, a mutual mistake, or a deliberate fraud? Where is the evidence that there was a mutual mistake?

MR. BUTLER: No, there isn't any.

THE COURT: All right, out.

Let's go on to the fourth.

MR. BUTLER: I think the last two are kind of cumulative in the sense of looking for damages. I believe the fourth cause of action relates to the first cause of action.

THE COURT: This is damages on the first?

MR. BUTLER: Just the damages on the first.

THE COURT: The evidence there you say is in the testimony of --

MR. BUTLER: Mr. Grenesko, simply on the issue of the value of the improvements less the depreciation and their present book value, because all of the -- pursuant to the lease all of the improvements

1 become the property of the landlord.

2 THE COURT: All right. The fifth

3 cause of action is just repetitive again.

4 MR. BUTLER: That fifth we took out the

5 other day. And I think the sixth, if I am not mis-

6 taken, refers to the third, which is the one which we

7 took out.

8 THE COURT: So that's out, really. All

9 right.

10 Before we go to the defenses, do you have

11 any evidence on item 2 in your wherefore clause, (2)ii?

12 MR. BUTLER: Well, I think that in the

13 stipulation it is recorded in there that we have been

14 paying the rent from the time we started until the

15 time we finished. Right up to date we are still paying

16 rent.

17 THE COURT: You asked for the differ-

18 ence between what you paid and what you should have

19 paid. I suppose that's what this amounts to.

20 MR. BUTLER: Right, your Honor.

21 THE COURT: Where do you calculate it?

22 Or am I supposed to look in a crystal ball?

23 MR. BUTLER: I thought that was something

24 we could obviously work out. We have paid X number

25

of dollars. That we know. The only fair way to do it, it seemed to me, is that you would take what we would have paid if the rate was $1.60 --

THE COURT: Tell me what the arithmetic is. I have other things to do than your arithmetic. You would think I have a cast of thousands the way you come in here.

MR. BUTLER: Your Honor, we have estimated -- Mr. Keane of my office has prepared the figures and the taxes approximately are $45,000 --

THE COURT: Please, just give me the total sum.

MR. BUTLER: $55,000.

THE COURT: All right.

What about your claim for punitive damages? How do you show a basis here for punitive damages?

MR. BUTLER: Your Honor, it is my belief that the fraud, what we allege to be a fraud, was a scheme perpetrated with knowledge, because --

THE COURT: First of all, suppose you tell me what the legal principle is for your recovery of punitive damages. You don't brief it.

MR. BUTLER: The legal principle of my pecuniary damages has to be that you have to prove that

the acts were wanton and deliberately intended. The result is not just intending the result, but a --

THE COURT: Maliciousness.

MR. BUTLER: -- maliciousness, maliciousness.

THE COURT: Where is the evidence here of malice?

MR. BUTLER: I think the evidence of malice, your Honor, can be drawn from the documents that when a situation was called to their attention, that it would be economically unfeasible for tenants to go into that mall and it was based on the figures which had been prepared by the office.

If you stop and think for a second that when the accountants said, "You know this is going to be economically unfeasible for our tenants. How can we sign anybody up? They can't live with this thing. What are we going to do? They can't live with this," now what did they do. They went right on ahead.

THE COURT: Are you serious about this punitive damage? I would have thought if you were serious about it it would have been in your trial brief.

MR. BUTLER: There was a case in our trial brief, your Honor.

THE COURT: Yes, sure, there are cases in the books. I can find the cases. Harper on Torts, Prosser on Torts, The Restatement of Torts, but you don't relate it to this case in any way.

MR. BUTLER: Your Honor, the case which we cite says if the fraud is such that it goes beyond the individual to the public --

THE COURT: That's what I thought.

MR. BUTLER: Then in that event --

THE COURT: How does this go to the public? It's to a limited group of people to start with, prospective tenants.

MR. BUTLER: A limited group of people, yes. A good number, yes. Publicly stated, circulars, advertising brochures, but not limited to just one person, to a group of people. There are licensed real estate people here who are making these representations. It's against the law for them to do that. It's against the law of the State of New York to misrepresent a known fact. There is no doubt that the occupancy level was a known, existing fact. They induced wilfully, freely, of their own volition.

1 People enter into leases knowing that they coulnd't
2 live with them, and I think the record has numerous
3 recitals of the other people who were having problems
4 out there, and I think it was reflected that another
5 law firm was retained and 25 tenants got together,
6 and there were all kinds of problems. All the
7 problems went back to the basic misrepresentations,
8 the representations about occupancy, the representations
9 about common-area charges, the representations about
10 taxes when they had the information as early as August.
11 THE COURT: That just shows fraud.
12 It doesn't show malice, it doesn't show -- if this were so
13 in every fraud action, the plaintiff would be entitled
14 to recover punitive damages.
15 MR. BUTLER: May I direct my attention
16 to --
17 THE COURT: Let's see. You are asking
18 for costs and disbursements, including attorneys' fees.
19 American courts don't generally award attorneys' fees.
20 What's the basis for recovering attorneys' fees here
21 and what's the evidence that any were incurred or how
22 much they are?
23 Do you abandon it, is what I am getting
24 at?
25

MR. BUTLER: Yes, your Honor.

THE COURT: All right, now let's go to the defense.

MR. BUTLER: The defense can be characterized, laches, waiver, estoppel --

THE COURT: Well, we are all different, you know. It's nice to lump things together, but when courts decide cases they can't do it, so I am afraid you must be specific.

MR. BUTLER: Laches, the concept of not acting as soon as we should act. The statute of limitations gives us six years from the date we discover the fraud. The record I believe is clear that as soon as we got the August bill, on August 23rd, we wrote to Feist & Feist, we mentioned in that letter that it had been misrepresented to us about the tax rate. That is specifically in the letter. We informed them.

They came back with the reply some time in June.

THE COURT: What's the total lapse of time?

MR. BUTLER: The total lapse of time? Your Honor, from the time we learned of the common-

area charge on April 15, 1974, from that point in time, there was a settlement negotiation, which was in May --

THE COURT: Total lapse. Then we will fill it in with the detail. How many years?

MR. BUTLER: A year and five months. Seventeen months.

THE COURT: Seventeen months. All right.

You say during that period you were dickering with them.

MR. BUTLER: Well, we were dickering with them. First we have August. We write to them, we receive a reply after that. Then in April of 1974, April 15, 1974, we get the notice about common-area charges. We immediately complain to them. We request a meeting. Our letter, which is in the record, it is Mr. Kelly's letter, complains of -- I will refer to the specific exhibit, Plaintiff's Exhibit No. 26, has in it on page 22, we refer -- it was represented to us that the common area would be 60 cents a square foot.

2 It was represented that the taxes would be
3 one dollar a square foot. It was represented that the
4 mall --
5 THE COURT: But the evidence certainly shows
6 that you knew all about this, that your lawyer knew all
7 about it, and that you decided not to sue.
8 MR. BUTLER: That is not true, your Honor.
9 What we did at that point is we sat down with them, we asked
10 them for a release --
11 THE COURT: You decided not to sue because you
12 did not think you could win -- the evidence is overwhelming
13 to that effect.
14 MR. BUTLER: Your Honor, their opinion as to
15 the outcome of their success was based on the difficulties
16 encountered in a fraud case.
17 THE COURT: That may be but nevertheless it was
18 a free choice, wasn't it?
19 MR. BUTLER: Well, 18 months within which to
20 bring an action when you are negotiating with the party,
21 when you are asking for reformation, litigation is indeed
22 too expensive. It was better for them to sit down with
23 the parties -- and, remember, that they had asked for that
24 meeting. This meeting was a mutual meeting by the
25 parties.

THE COURT: When did you start and when did you terminate your negotiations?

MR. BUTLER: The negotiations -- the letter was April 3, 1974. The meeting was, as I recall from the testimony, in May. The reply was a reply from John Feist that he couldn't do anything.

We had sent our financials to them. We showed them how bad the situation was. In June we received a letter -- in June 1974 -- that "We can't do anything more."

What did we do? We stopped paying our bills, our taxes, that is, the excess that we are talking about -- we stopped paying that.

They sued us in Civil Court in a summary proceeding where you could not bring a counterclaim for recision, and instead we brought the action over here.

I think that --

THE COURT: What lapse of time was there between June and the filing of this complaint?

MR. BUTLER: I would say about five months, six months, if that.

There was a summary proceeding in September in which we learned that we could not defend this properly there.

We moved to stay that case so that we could bring this one, and we entered into a stipulation in that case whereby we agreed to pay all the expenses, and we did -- and that is in the stipulation of facts -- and then we brought a suit in this court.

I think that at all times they were fully informed of our position. Our position never deviated. We tried to avoid --

THE COURT: Why doesn't it estop you when you stipulated to pay all the expenses, after you knew all these facts?

MR. BUTLER: Your Honor, the law of New York -- the CPLR, Section 3004 -- provides for just this very difficult situation. If you don't pay your rent you have a summary proceeding, you come into court, and kicking you out. You have to pay your rent. In a summary proceeding you cannot contest the lease itself on the basis of a fraud. They have no power to grant a recision, so we are out -- if we don't pay the taxes we are out -- period.

We have a difficult case here. I do not think any attorney could say "Move out and take your chances."

The reasonable thing, as the law provides -- CPLR 3004 -- that you stay with what you have and let the

Court decide what the parties are. Staying in possession is not --

THE COURT: Let the Court decide what the parties are?

MR. BUTLER: For the Court to determine --

THE COURT: What does the statute provide? I don't carry the CPLR around in my head.

MR. BUTLER: Let me give you a copy, your Honor (handing).

THE COURT: (After examining) I don't see how this even bears on the problem. This just says that you do not have to tender what you got in order to rescind something.

MR. BUTLER: Your Honor, if we stopped paying we are out the door, in a summary proceeding.

THE COURT: Yes, but this statute doesn't bear on the problem.

MR. BUTLER: The statute says that where you have an action for fraud you do not have to tender, you do not have to give up the premises, you do not have to leave, you do not have to stop at that point in time and go, and then bring your action and then find out that you do not have an action, in which event you have breached the lease. You are betwixt and between. I mean, that

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was the law 100 years ago.

THE COURT: All right.

MR. BUTLER: The other point of laches and waiver, since waiver has come into this, is prejudice.

What prejudice has there been to the landlord? We have paid rent, and we are paying rent.

THE COURT: Why couldn't they have rented the premises to someone else?

MR. BUTLER: Well, we are still paying rent; we are in there, we are paying rent.

THE COURT: But the market has dropped. According to your evidence it fell off in October.

MR. BUTLER: Your Honor, there is plenty of space out there, and there always has been plenty of space out there.

THE COURT: But there is an economic slump that has come on. The evidence shows that, and I will take judicial notice of that. The real estate market is zero.

MR. BUTLER: Well, aren't they better off having us in there paying rent? We are paying rent. We haven't denied --

THE COURT: No, you have denied them the opportunity to rent it to someone else. That is where the prejudice comes in. You foreclosed that opportunity by

not acting promptly -- and why isn't that a sufficient prejudice.

MR. BUTLER: Because, your Honor, they have to lease many other stores there, many other locations, and there is no proof in the record -- none at all -- that they could have leased taht store at a higher rent, or any rent, or leased it at all.

One of the problems at the mall is the fact that they are not leasing space, and for them to say that again they could have leased our store, why, our staying in there has been a benefit to them.

2 THE COURT: Well, why couldn't they lease your store? Your own figures show that at or about the time that you discovered these facts the level of occupancy and of rentals was steadily increasing, up until October. It is all set out in Exhibit 7.

Why wouldn't your store have been available? What is to prevent their renting that space? They obviously can't rent it if you are there.

MR. BUTLER: Your Honor, we are there and we are paying rent. I do not understand how they could possibly say that they were going to --

THE COURT: They can't get a 15-year tenant now.

MR. BUTLER: Well, they haven't been able to establish that they could get a 15-year tenant now.

THE COURT: Why not, when they were increasing -- they were making more sales every day -- why not? Your own evidence in Exhibit 7 shows that.

MR. BUTLER: But there has been nothing for the last -- that exhibit shows nothing over the last few years. There is no proof that in the last two or three years --

THE COURT: No, but they wouldn't have to worry about the last two or three years if they could have substituted another 15-year tenant had you acted promptly.

MR. BUTLER: The other answer to that is that when we were negotiating with them in April -- I mean in May -- they could have at that point have said, "We refuse to negotiate with you."

You cannot negotiate with someone in good faith to resolve your problems -- you go in there and you sit down and negotiate, and then, on the other hand, for them to say "We are being prejudiced because we could have possibly rented your store to somebody else."

Your Honor, we acted in good faith with them and gave them an opportunity, a full opportunity to resolve this problem, and only after that, after all negotiations failed --

THE COURT: Well, you stopped paying your rent.

MR. BUTLER: We did not stop paying rent -- oh, yes, we did.

THE COURT: Sure you did.

MR. BUTLER: Yes.

THE COURT: And you thereby knew that you were bringing on a summary proceeding. That was compelled under the circumstances. So it seems to me that the moment you stopped paying your rent you had a remedy -- the remedy then of going into court, such as you have now.

When did you stop paying rent?

MR. BUTLER: We stopped paying rent, your Honor, because --

THE COURT: When?

MR. BUTLER: When?

THE COURT: Not "because" or "why"; when?

MR. BUTLER: As I recall from the testimony -- let me just check that -- I believe it was August.

THE COURT: And when did you sue them -- a year later?

MR. BUTLER: No, no. We were sued in September -- October, and we brought this action in December.

With regard to waiver, waiver also needs prejudice. I don't think they put in any evidence from any of their witnesses that in any way they have been prejudiced, and I don't believe that our payment or staying in possession constitutes a waiver when we are complaining, informing them clearly and unequivocally of our complaints.

With regard to estoppel, again I believe that we acted as diligently -- I mean there was no delay at all. As soon as we got that first bill we started the complaints going. And the other thing which should not be lost sight of is that our tenant -- and this is in the record, the evidence, the document which we presented -- Morris Gliklich -- that they had retained counsel. There was a group of 20 or 25 tenants, and so they were looking for legal relief. The tenant himself was looking at the possibilities of legal relief in 1974 with an entire group of tenants, and it was therefore, after we had to wait for that matter to be settled, because it was the tenant himself who had to take the step -- I think everything was done that could possibly be done. The facts are that we did give them notice, that we informed them fully, that we stated clearly that there were misrepresentations. We stated it right off the bat, both in our August letter and in our April letter, that this is what we are complaining

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about.

We had meetings with them. We tried to settle it, and we ended up here, and I think from start to finish we are talking about late August to early December, intermittent with a judicial proceeding In the Civil Court.

THE COURT: All right, we will take a short recess.

(Recess.)

THE COURT: Do you wish to reply?

MR. BERGEN: Yes, I do, your Honor, but I do not think Mr. Butler is finished.

THE COURT: I thought he had.

MR. BUTLER: Unless your Honor wants to direct your attention to the merger clause.

THE COURT: I would like some argument on that. Have you seen your opponent's memo?

MR. BUTLER: I saw it, your Honor.

I might say, first, that there is nothing in there which has to do with the merger clause.

There are two cases essentially -- Court of Appeals decisions in the State of New York. Take the Sabo v. Delman case.

In the Sabo case -- well, the principle which we are talking about, the merger clause language is general.

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The Courts of the State of New York uniformly say that that general language, with no representations made, something of that nature, is not sufficient to deny a person the opportunity to produce oral evidence to vitiate that contract. The phrase in the contract is "void". As the Court said in Sabo:

> "However, the parol evidence rule has no application on a suit brought to rescind a contract on the ground of fraud. In such a case, it is clear evidence of the assertedly fraudulent oral misrepresentation may be introduced to avoid the agreement."

On the other hand, you have on the other side a specific representation.

3 By "specific" I am talking about a representation which forms the basis of the action and which the very representation is contained in the merger clause and which states that the person did not rely on that.

In the Danann Realty Corp. v. Harris, we have an example of a specific clause. There the action was on a misstatement, fraudulent misstatement, alleged fraudulent misstatement with respect to expenses in operations. The merger clause said that they are not relying on any representation of expenses made by the

seller -- specific -- because I guess the rule is very simple to understand.

A person who is committing a fraud, if he wants to protect himself from that act has got to call it to your specific attention and say "I am not making any representations to you about income. You are not relying on any of my representations about income." And once you do that you phrase the issue, specific areas that you are talking about.

Then the Court said you are precluded from that. Otherwise contracts would go on ad infinitum. The Court used language, as we have here, general langauge, "All negotiations, considerations, and representations and understandings between the parties are incorporated in this lease"; or "Landlord or Landlord's agent have made no representations, warranties or promises with respect to the demised premises or the building except as herein expressly set forth."

That type of general language, where you are not putting the other party on notice with regard to the specific representation, the Courts in this state, the Court of Appeals on down for years have specifically said that type of language will not protect anyone; and in the Sabo case the statement there was that no verbal under-

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standing or conditions not herein specified shall be binding on either party -- and that language I say, your Honor, is close to this, and there the Court rejected that as general phraseology.

The other case, which is probably even more compelling, is Jackson v. State -- that is the Sate of New York, and this is an Appellate Division decision which was affirmed by the Court of Appeals.

(Continued on next page.)

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2 They put the question just the way you put
3 it as we closed yesterday, that paragraph 10 of the
4 contract does not prevent the state from its misrepre-
5 s entation, the contract stands as though it did not
6 contain such paragraph. If the contract had not
7 contained paragraph 10 it would be clear that the
8 state would be liable for misrepresentations.
9 Therefore, the question was, can the state by that
10 paragraph save itself from a fraudulent act. In
11 that case the clause made reference to materials which
12 were to be excavated. They did not give to the
13 seller, to the buyer information which they had in their
14 possession relative to the quality of the material,
15 and the court said in that paragraph that merger
16 clause does not protect you even though you are the
17 state.

18 So when you want to save yourself from
19 your own misrepresentations, then you have to point
20 it out to the person and say you cannot depend on any
21 representations we are making regarding occupancy.
22 Once you wave the flag to the other party, then the
23 party has the obligation either to accept it or negotiate
24 or do something, but the general language in this
25 state is not acceptable to protect anyone from their

fraudulent activities.

THE COURT: Mr. Bergen, before you start, is there any issue here about jurisdiction? There is diversity, is there not?

MR. BERGEN: Yes, your Honor.

THE COURT: You concede that. Is there any issue about whether these defendants are separate or we treat them as one?

MR. BERGEN: No. We can treat them as one.

THE COURT: All right.

MR. BERGEN: Your Honor, I would just like to review initially some of the evidence. Basically I want to direct myself to Mr. Kelly's testimony, particularly on cross examination, because Mr. Kelly, John Kelly, was the man who negotiated this lease. No one else negotiated it. He was the one who was responsible for it. He was the vice president of Magnaleasing. He signed the lease on behalf of Magnaleasing.

I would like to start off by sahing I don't think there is any question in anybody's mind that Mr. Kelly understood that these figures that he says were given to him were estimates. He said

that in response to a question that I asked him and he said that in response to a question -- a series of questions that your Honor asked him. He also testified at page 193 that Mr. Kirtland didn't tell him that this 60-cent figure applied to any particular period of time. Mr. Kirtland told him that the 60-cent figure was estimated and that's what the figure was going to be in the lease. He also said that he didn't have any understanding as to any particular period of time.

The cricial part of his testimony appears on pages 194 and 195, and I would just like to read a few of those questions and answers.

On 194, and I quote beginning at line 11:

"Q Did you expect to pay according to the provision in the lease?

"A Yes."

I went on to ask him:

"Q Now, referring to the second page of the January 15th letter" -- and that was the letter to Mr. Kirtland, sent to him, setting out the basic terms that they had arrived at for the lease, the fixed rent and construction costs -- "and I quote" -- it says in the transcript -- "Real estate taxes: Landlord will pay

first 25 cents per square foot, tenant will pay his proportionate share all over."

"Can you tell me what you understood those two sentences to mean?

"A That those real estate taxes, the tenant will pay the first 25 cents per square foot and we would pay our porportionate share over and above that.

"Q Does it say anything in that letter about one dollar a square foot?

"A No."

I am now on page 195.

"Q Did you ever ask Mr. Kirtland, after you got that letter, what happened to the dollar a square foot figure?

"A No.

"Q Did you ask him why the dollar per square foot figure that you say he gave you with respect to taxes, his estimated taxes, wasn't in the letter?

"A No.

"Q And did you expect the tax figures -- and again I am referring to the provision in the January 15th letter, referring to real estate taxes -- did you expect that there would be a provision in the lease covering taxes?

"A Yes.

"Q And did you expect that you would pay taxes according to what the lease said?

"A Yes.

"Q And in fact, didn't you plan to pay additional rent, specifically taxes and common area charges in accordance wi th the written provisions of the lease?

"A Yes.

"Q And you had that expectation at the time you signed the lease?

"A Yes."

That line of testimony is dispositive.

THE COURT: I don't agree.

MR. BERGEN: By his admission that he understood that they were going to pay according to the lease and the fact that he never asked what happened to the dollar figure in the January 15th letter, he never asked that it be inserted into the lease --

THE COURT: I don't think that's any answer to the fact that he made these estimates with his one hand and he had the diametrically opposite information in the other. That's what I want you to answer. Why isn't that a fraud?

MR. BERGEN: Because the estimates that --

THE COURT: They were not honest estimates.

MR. BERGEN: I don't think they were fraudulent estimates. They may have been mistaken. The 60-cent estimate may have been wrong, but the fact is that the 60-cent estimate was in the lease. It was specifically said that for the initial period of the billing it would be 60 cents. What could be clearer than that?

THE COURT: Because you put the misrepresentation in the lease, it doesn't destroy it.

MR. BERGEN: I am not saying it was a misrepresentation.

THE COURT: All right, go ahead. I just don't buy this.

MR. BERGEN: Now, Mr. Kelly's testimony also was that he didn't ask to insert the dollar figure or he didn't ask that any provision be in the lease with respect to the 60 cents, that that was the way it was going to be for anything other than the specific language in the least, and he said he didn't ask for that because he knew he wasn't going to be able to get any kind of a maximum figure for taxes because that isnt' the practice in the industry.

You can't put a maximum figure in for taxes when nobody knows what's going to happen to taxes, and particularly in this case where they went through the roof in less than a year and a half. The same with the common-area charges.

At 206 of Mr. Kelly's testimony he clearly testified that he understood the difference between the denominator being leased or or occupied, which was in their lease, the Magnaleasing lease, and whether the denominator had been leasable, and he also testified at page 207 that he understood that had the denominator been leasable the figures would have been lower.

Now, Mr. Butler started talking about what the taxes were and at one point I think he used the taxes finally were at some point $5 or something.

We have stipulated that on August 9, 1973, when they got the first bill, the taxes were $2.45 a square foot. That's paragraph 64. At paragraph 65 we stipulated that on April 15, 1974 the taxes were 2.63 a square foot.

We also stipulated that over a year and three or four months later -- two months later, June 1, 1975, the taxes went up to $6 a square foot, $6.04 cents per

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square foot. I think the jump between the April figure of 1974 and the figure of June, 1975, is partially attributable to the fact that everything went haywire during that period.

THE COURT: What the taxes turned out to be here is absolutely irrelevant and immaterial to the misrepresentation other than as it may bear on it.

MR. BERGEN: Then why have they made a big deal out of it?

THE COURT: I don't know. I didn't prepare their case nor present it.

MR. BERGEN: I think that they are material in the sense that again if Mr. Kelly had negotiated for --

THE COURT: How is that relevant to an estimate that was made months before? Whether the estimate worked out right or wrong really isn't the question. That isn't the question at all. The question is, was the estimate an honest one at the time it was made.

MR. BERGEN: The real question is not only was it honest, but was it given with intent to deceive and was it known at the time that it was false.

I submit that if it was a mistake --

THE COURT: Show me what the evidence of a mistake is, of a mutual mistake. Suppose it was just a unilateral mistake and misrepresentation, or suppose it was just a negligent misrepresentation, why isn't it still actionable if it is a representation?

MR. BERGEN: Because it isn't fraud.

THE COURT: And a falsehood.

MR. BERGEN: Because it isn't afraud.

THE COURT: Do you mean to tell me in New York law you can't recover for negligent misrepresentation? You don't mean to tell me that,Mr. Bergen, you are too good a lawyer.

MR. BERGEN: No. I mean to tell you you have to prove the elements of fraud and I think fraud is different from a negligent misrepresentation.

THE COURT: On a negligent misrepresentation?

MR. BERGEN: Yes.

THE COURT: Not since Lancer v. Sheppard, which I studied a hundred years ago in law school.

MR. BERGEN: We haven't had any allegations here that there was a negligent misrepresentation.

They have alleged fraud. They have alleged that we deliberately misrepresented these estimates. That we knew they were false, that we told them to them with the intent to induce them to enter into the lease --

THE COURT: No, they haven't said a word about it, but you did. That's why I got into it. I am telling you negligent misrepresentation doesn't take you off the hook.

MR. BERGEN: It does on this case.

THE COURT: Not by any means.

MR. BERGEN: It does in this case because they haven't alleged that, they have alleged fraud. We haven't heard one thing about --

THE COURT: Negligent misrepresentation is fraud.

MR. BERGEN: Not under the allegations of this complaint it isn't. This complaint is very specific.

THE COURT: All right, proceed.

MR. BERGEN: I would just like to stay weith that formula for a minute, because again I think it's relevant. It does make a difference whether Mr. Kelly realized, like some other tenants, the significance of the leased or occupied and so forth to

have that modified to leasable.

THE COURT: I don't think there is any dispute about he understood exactly what the lease says. There isn't any question about that. There is no room for dispute that he understood. He says so. I accept that.

MR. BERGEN: Well, let's go to the question --

THE COURT: But I say so what?

MR. BERGEN: I think it makes a difference because the figures would have been very close. Had he negotiated for leasable, they would have been very close to what these estimates were and it shows that the estimates weren't even negligently made. They were estimates. They were guesses. You can look it up in the dictionary. I think the dictionary probably says an estimate is a guess and everybody understands that. Mr. Laxson, who was one of the people at that meeting, testified on his deposition that an estimate is a guess.

They claim that they found out in August of 1973 what the taxes were going to be, and they claim that they did an awful lot between then and December of 1974 before they finally got around to

commencing this action to show that they hadn't waived any of their rights. All they did was they sent a letter to Mr. Faughnan in which Mr. Kelly said, "I don't understand how these figures could be so far off when Mr. Kirtland told me a dollar."

Mr. Faughnan wrote back to him and explained to him, "You know what happens with real estate taxes in New York City, and, secondly, if your denominator was leasable space, then your taxes, your proportionate share of the taxes, would be much less."

What did they do after that? Nothing. They just sat back until April of 1974 when they got the first bill.

THE COURT: Wait a minute. They were negotiating with you, weren't they?

MR. BERGEN: No, they weren't. There isn't any evidence in this record --

THE COURT: What's all that correspondence exchanged?

MR. BERGEN: What correspondence?

THE COURT: It's in evidence.

MR. BERGEN: There isn't any correspondence about negotiating. It wasn't until they got --

THE COURT: They complained about it and

you wrote back to the effect that you couldn't do anything about it. Isn't that correspondence to that effect?

MR. BURGEN: That's in June of 1974. That's in June of 1974, because when Mr. Faughnan wrote back they paid the rent and that was where Mr. Kelly wrote that little routing slip memo to Mr. Grenesko and said, "I don't see any way out, we will have to pay it," and they paid it, and they paid the next month and the next month and the next month, and they kept paying it. It wasn't until April of 1974, when they got the common-area charges that they suddenly were then kind of galvanized into action. They sent a letter to Mr. Feist and then they had the meeting on May 16th.

I submit that that letter, the memo, Mr. Kelly's memo, of that meeting doesn't sound like a man who has been defrauded or thinks he has been defrauded. It was an internal memo. It wasn't any memo that was sewnt to Mr. Feist. The memo speaks for itself. It doesn't say anything in here about "We told John Feist that they defrauded us or that they misrepresented things to us." In fact, it sounds quite conciliatory.

He says to Mr. Michaelson, "It appears that they are attempting to bring costs in line. However, they have been beset with some horrendous problems and resulting cost increases."

THE COURT: There is no dispute in the evidence here of what was said. You haven't produced any witnesses who dispute it at all.

MR. BERGEN: I don't think we have to.

THE COURT: Kirtland wasn't there.

MR. BERGEN: I don't think we have to because I don't think they proved their case.

THE COURT: That is a tactical choice you have to make.

MR. BERGEN: I understand that.

THE COURT: But the evidence is not denied.

MR. BERGEN: I don't think it makes any difference whether it is denied or not, because I don't think that those are fraudulent representations on which they can base this lawsuit.

THE COURT: All right.

MR. BERGEN: I think the evidence shows, and Mr. Kelly testified categorically that the only thing that really triggered them into bringing this

lawsuit was, one, they got sued because they stopped paying the rent and, secondly, the costs were going too high. It wasn't because he suddenly decided that they had been defrauded. He had come to that conclusion way back in talking of 1973 and we have got that whole series of memos from Mr. Kelly to Mr. Michaelson and Mr. Michaelson back and then Mr. Kelly again to Mr. Michaelson, in which they say, "We don't have a strong enough case to recommend legal action."

That's fine. If that was wrong, that's not something that we should suffer for. They are the ones who slept on their rights. If they didn't take those papers and go out to a lawyer right away and consult with another lawyer -- they had Mr. Kelly who was a lawyer, Mr. Hafner who was a lawyer. Mr. Hafner was responsible for it. If they didn't do anything, that's just too bad, because they waited from June 20, 1974, when Mr. Feist wrote back to them after that meeting they had here in New York in May that "We are sorry, we can't do anything." In effect he said, "You are a large corporation. You understand what your obligations are and what kind of a deal you are getting into."

I think another important fact is that

Mr. Kelly testified that there was nothing new that happened between July of '74, when he wrote these memos to Mr. Michaelson, and December, no new facts came to light. All the facts were there. They had known them since August of 1973 and yet they didn't do anything.

THE COURT: It is not a very long time when you have a six-year statute of limitations. Equity normally follows the law, so we wait six years before we would say there was laches.

MR. BERGEN: I don't think the statute of limitations has anything to do with it because the are cases --

THE COURT: It's one of the things a court of equity considers. What are you talking about?

MR. BERGEN: It doesn't have anything to do with it because there are cases in New York that say if you stay in premises for five or six months after you know of some fraud and you don't get out and you continue to pay rent and then all of a sudden, six months or five months later you haven't done anything, you have waived your rights. You have an obligation to act quickly and it isn't true what Mr. Butler said, that they could not defend the summary proceed-

ing. They could have raised their fraud defense, they could have raised any defenses they wanted to. The only thing they couldn't do in the summary proceeding was counterclaim for rescission, but they could have raised all those defenses.

The New York law says that after the summary proceeding you have 60 days to assert any counterclaims that you were not able to assert in the summary proceeding in a separate lawsuit. So they could have gone ahead and defended that summary proceeding with all the claims they have brought here except the rescission. They could have alleged the fraud, they could have done everything.

THE COURT: They could have sued you in the Supreme Court, couldn't they?

MR. BERGEN: Sure.

THE COURT: Even though the summary proceedings were pending they could have.

MR. BERGEN: Yes, they could have.

THE COURT: What's to stop them?

MR. BERGEN: Nothing, but Mr. Butler said they couldn't do anything in the summary proceeding and that isn't accurate. They could have asserted these defenses.

THE COURT: Well, whether he could or not, he had an open hand in the Supreme Court.

MR. BERGEN: That's what he was told by the magistrate who we argued a motion before in the summary proceeding where he tried to get that stayed.

I would just like to bring to the court's attention these two opinions that deal with waiver.

Dealing specifically with the provision on the common-area charges --

THE COURT: Let's take the 50-50 point first here, the 50 per cent occupancy. That's not an estimate, that's a flat categorical, unequivocal statement of fact.

MR. BERGEN: Well, let's take that. Mr. feist testified that if you take the 19 per cent figure on Plaintiff's Exhibit 6, which is the schedule of leases, and you add that to the 44 per cent figure, which is the leases out -- and Mr. Feist testified that it was their experience that 95 per cent of the leases that were out to tenants were signed, if you take those two figures and add them together, then you have got 50 per cent.

Mr. Feist also testified that they looked upon the leases-out figure, where leases were out to

tenants as being space that had already been leased at least to the extent that they told their sales people, "You can't run around and start leasing spacebecause the lease is out on that, so forget about that one."

The leasing plans that Mr. Kelly testified about that were shown to him, I think they are Plaintiff's Exhibits 20 and 21, if you look at those plans very closely there are 23 blank stores on the first and second level. That doesn't indicate to me that Mr. Kelly's testimony was accurate when he said that Mr. Kirtland told him that it was basically all leased. All he had to do was look at the two leasing plans that they introduced into evidence and he could see that there were 23 vacant stores. They din't have a black dot indicating that there had been ~~a lease~~ signed, they didn't have a small black dot indicating that the leases were out and they didn't have the names written in of some of the stores where the leases had been signed and the stores had already been allotted.

THE COURT: Were the names written in on leases that were out?

MR. BERGEN: No, there were small dots, and Mr. Kelly testified, and then there were black

dots. These things were constantly changing. So sometimes they would have a leasing plan that would have names in it and just black dots, and the next leasing plan that came out they would eliminate I assume some of the black dots and put in a name for the store.

So we had three things on the leasing plans: the ones where there were names already written in, the large black dots indicating that there were leases signed and the small black dots indicating that leases were out. But what I am directing my attention to is that there are 23 blank stores in the mall, and if you looked at it carefully, as apparently Mr. Kelly didn't, you would know right away that the mall was basically not all leased.

THE COURT: What portion of the 23 would that be? At a glance.

You see there are 23 black spots. Is that a third of the mall? How many blank spots are there in the diagram? What are the total spots?

MR. BERGEN: I imagine it would be maybe 15 per cent. I didn't total up -- because each one of them has listed in it the square feet.

THE COURT: All right. Now what are

you saying? Having shown him the diagram, do you say there is no representation that half is rented, is that what you are saying?

MR. BERGEN: I am saying that the representation -- first of all, it isn't a representation that half was rented. Those brochures say 50 per cent, but they are advertising brochures. There is not a representation there that we are representing --

THE COURT: You are saying that's puffing?

MR. BERGEN: Yes.

THE COURT: Touting.

Is the testimony -- I don't recall -- that Kirtland showed these diagrams to Dale Kelly?

MR. BERGEN: I think he brought them out that day that they were there and he gave them to them. I'm sorry. He sent them to them earlier.

THE COURT: He sent it to them earlier. He had them.

MR. BERGEN: Yes, he had them at the time. That's correct. I believe he had them with him and I think John Kelly testified that even he scribbled in some names in ink. Like Mr. Kirtland told him, "Well, you know this store is leased to. . ."

THE COURT: All right.

MR. BERGEN: I think the fact that the plaintiff a matter of months ago amended the complaint to insert the word "approximately" really proves and emphasizes the fact that this was an estimate and that they understood that it was an estimate.

THE COURT: The word "approximately" itself means an estimate, doesn't it?

MR. BERGEN: That's correct. But before that they said there was a flat representation. Now all of a sudden it's approximately.

THE COURT: But the testimony is plain. Everybody understood it was an estimate. I have no trouble finding that as a fact all the way down the line.

MR. BERGEN: Getting to the fraud argument itself, your Honor, we are not relying on the general merger clause in this lease. We have never taken that position so none of Mr. Butler's cases are applicable. The Saybo case isn't even close to this one. There the defendant promised to do something. He promised to promote and finance the manufacture of certain shoe manufacturing machinery in exchange for an assignment from the inventor of the patents on the machinery. After he got the

assignment of the patents he neither financed the manufacturing of the machinery nor did he attempt to promote the sale of the machinery. That was the fraudulent representation and the Court of Appeals, I believe it was Judge Fuld, said, and I am not quoting, but he spoke to the fact that a promise made with a preconceived and undisclosed intention not to do what you say you are going to do is a misrepresentation of "a material existing fact."

The court then went on to say, therefore -- and using the words "a rogue" -- a rogue can't use a clause such as, and the clause in this case was no verbal understanding or conditions not herein specified shall be binding on either party, a rogue can't use a broad clause like that to get out of a fraudulent representation, which the court defined as a promise to do something, when you knew at the time you made the promise you weren't going to do anything.

We didn't promise to do anything here. We told them what an estimate was of the common area charges and the real estate taxes. Fraud has to be proved by clear and convincing evidence. There is no misrepresentation of fact here with knowledge of its falsity. They haven't proved and there

isn't any evidence in the record that we knew the estimates that were coming from Mr. Faughnan were true and accurate and there were all kinds of them, and therefore we determined to keep those estimates as secret and use another estimate. There isn't a scintilla of evidence that that's what was done. There is no proof of intent to defraud either and there really should have been no justifiable reliance on a guess, an estimate as to what future taxes would be and what common-area charges would be. I think the cases that we cited in our supplemental memorandum go directly to that point.

Now, directing my attention to the claim for punitive damages, I think under New York law, under Walker against Sheldon and James Gaines Powell, you have to prove fraud, that the fraud was gross and malicious, and, as your Honor pointed out also, it has to be aimed at the public. They haven't proved either of those and I think that this is really a case where the punitive damage claim is thrown in just for window dressing.

Unless your Honor has any questions, I [illegible] finished.

THE COURT: All right. We will take

a short recess.

(Recess.)

THE COURT: I want to express my thanks for the very helpful arguments of counsel. They were somewhat longer than I normally could suffer, but I did not suffer, they were so well presented and on target. While I had hoped to decide this matter from the bench, in view of its complexity and its importance to the parties, I think we will reserve decision.

Now, do you want to submit posttrial briefs?

MR. BUTLER: Yes, your Honor. Maybe a short one.

MR. BERGEN: I don't believe we have anything to brief, your Honor, unless your Honor wants something specific.

THE COURT: Well, I would like briefs if you can get them to me.

How long will it take you. You have got a transcript. I don't intend to spend the summer poring through it, so I would like it quickly.

MR. BUTLER: Could you give us a week?

THE COURT: A week, sure.

MR. BUTLER: What is today, Wednesday?

THE COURT: Today is Wednesday.

MR. BUTLER: How about next Wednesday?

THE COURT: Wednesday noon?

MR. BUTLER: Yes.

THE COURT: Do you want to respond, reply to it?

MR. BERGEN: Yes.

THE COURT: How long will you need?

MR. BERGEN: Can you give us until Friday at 5 o'clock after that Wednesday?

THE COURT: Yes, sure.

All right. Thank you very much.

MR. BUTLER: Thank you, your Honor.

MR. BERGEN: Thank you, your Honor.

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